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PRACTICE
IN
SPECIAL PROCEEDINGS
IN THE
COURTS OF RECORD
OF THE
STATE OF NEW YORK
UNDER THE
CODE OF CIVIL PROCEDURE AND STATUTES, WITH FORMS.

BY
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DEAN OF THE ALBANY LAW SCHOOL.

IN TWO VOLUMES

VOL. I

SECOND EDITION.

ALBANY, N. Y.
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By MATTHEW BENDER.

PREFACE TO FIRST EDITION.

THE lapse of more than twenty years since the appearance of a treatise on the subjects discussed in this volume seems to render any explanation of the motives for this publication entirely unnecessary.

In addition to that fact, however, it may be noted that by the enactment of chapters 14 to 29 of the Code, taking effect in 1880, many and radical changes were made in the conduct of special proceedings, then for the first time codified. In the meantime, too, many of the remedies like *Certiorari*, *Mandamus*, General Assignments, and Proceedings to Acquire Lands for Railroad Purposes have gradually grown in importance, and the body of authorities on all the subjects treated is nearly, if not quite, twice as great as at the time of the issue of the last text-book in which they are considered.

As a matter of convenience to the profession, and to avoid examination of the separate volume, or reference to other portions of this volume, the Code or Statute on each subject is followed by a citation of authorities, and forms are given in the body of the text, enabling the practitioner to examine the legislative enactment as construed by the courts and to consult the precedents connected with both, with the least possible labor.

In case criticism should be made that the course of procedure as given in many instances is not orderly or logical, it can only be said that the arrangement of the Code and Statutes in that respect has been strictly followed as the only safe method, even though it may have resulted in stating the practice on appeal in a matter, before providing for the commencement of the proceeding.

The plan of the work includes all the special proceedings provided for by the Code of Civil Procedure, sections 1991 to 2471 inclusive, and in addition treats general assignment, reference of claims against estates, proceedings for sale of real estate of

religious corporations, and proceedings to acquire title to lands for railroad purposes, as provided for by statutory enactment.

The classification made by the Code reduces very largely the number of what were at one time classed as special proceedings excluding partition, foreclosure, mechanics' liens, and numerous other subjects heretofore treated as such, and now regarded as actions.

By reason of that fact, and by condensing the text so far as was possible without affecting clearness and accuracy, and by giving full pages of matter, the work has been confined to a single volume without sacrificing any substantial benefits, although the authorities cited include all the State Reports up to 44 Hun, 8 St. Rep., and 104 N. Y. R.

If, as has been said, every lawyer owes it to his profession to write a book, my duty in that respect is discharged, and it remains for the profession to determine whether its merits constitute a sufficient reason for its existence. The fact that it was written during hours snatched from active practice is no excuse for shortcomings, and if it does not meet the demands of the profession, it will richly deserve that condemnation which it will be certain to receive at their hands. While, if it prove of service, I need not bespeak a hearty recognition of that fact from my brethren of the profession, for whose benefit it was prepared and to whose criticism it is submitted.

J. NEWTON FIERO.

KINGSTON, *October 1, 1887.*

PREFACE TO SECOND EDITION.

SINCE the first edition of this work was published in 1887, there have been issued more than fifty volumes of the Court of Appeals Reports, being one-third of the whole number published, and more than eighty volumes of the Reports of the General Terms and Appellate Divisions of the Supreme Court. On many of the more important subjects the number of decisions has more than doubled in the eleven years that have elapsed since the first publication, as notably in the case of *Mandamus*, *Habeas Corpus*, *Certiorari*, Contempt, and, to a somewhat less extent, Supplementary Proceedings. In the meanwhile other subjects have attained such importance as to demand treatment in a work of this character attempting to give a complete system of Practice in Special Proceedings. New chapters are devoted to Proceedings under the Tax Law, in the Court of Claims, under the Election Law, and several other topics. The passage of the Condemnation Law has changed the practice and resulted in numerous decisions, while the statute changing References of Claims against Estates from a Special Proceeding to an Action has removed that proceeding from the scope of this work. The Special Actions, first published in 1888, passed through a second edition in 1897, and has become familiar to the Bar of the State, and the same plan as to arrangement and treatment has been followed here which proved convenient and satisfactory in that work.

In the preface to the first edition, I expressed a hope and expectation that the work would be "of service to my brethren of the Bar." The hearty recognition which has been accorded to it, now justifies me in assuming that fact as a sufficient warrant for a new edition bringing the Code, Statutes and authorities down to January 1st, 1899.

J. NEWTON FIERO.

ALBANY, N. Y., *April* 10, 1899.

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UNDER THE

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ARTICLE I.

SPECIAL PROCEEDINGS DEFINED. §§ 3333, 3334, 3343, sub. 20.

§ 3333. Definition of "action."

The word "action," as used in the new Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

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§ 3334. Id.; "special proceeding."

Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.

§ 3343. Miscellaneous general definitions and rules of construction.

In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

Sub. 20. The word, "action," refers to a civil action; the word "judgment," to a judgment in such an action; the term, "special proceeding," to a civil special proceeding; the word, "order," to an order made in such an action or special proceeding; the words, "an action of ejectment," to an action to recover the immediate possession of real property.

Much confusion has arisen under the present Code as to the distinction between an action and special proceeding, and the courts have, at different times, attempted to define "actions" and "special proceedings" respectively. The difficulty is stated by Daniels, J., in *Matter of Guardianship of King*, 42 Hun, 607. He says: "Strictly what an action may be now designated to be has not been defined in the present Code of Civil Procedure. What it contains on this subject is the statement made in subdivision 20 of section 3343, and that is, that the word action refers to a civil action, which is no more intelligible than many other portions of this Code. The preceding Code by subdivision 2 of § 1 was more clear and explicit in its definition, and that defined an action to be a regular judicial proceeding in which a party prosecutes another for the enforcement or protection of a right or the redress or prevention of a wrong, and declared every other civil remedy to be a special proceeding. This definition was clear and apt and entirely consistent with the preceding as well as subsequent understanding of the distinction between an action and a special proceeding."

The learned judge evidently overlooked the definition of an action in § 3333.

A note on the distinction between actions and special proceedings in *McLean v. Jephson*, 26 Abb. N. C. 44, states so clearly and fully the situation with regard to this vexed question that it is inserted in full as follows:—

"The original distinction between actions and special proceedings is very well understood. The Code says, that an action is an 'ordinary prosecution,' etc., but 'ordinary' needs definition

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even more than action. It means that form of prosecution where the claimant has a right to issue summons, to answer a complaint stating the facts constituting the cause of action, and defendant has a right to take issue or set up his facts in defence or counterclaim, and either party may require a trial and a judgment, enforceable by execution; as distinguished from those forms where the statute or the court prescribes other means of bringing in the defendant, or presenting the facts and formulating the decision and its enforcement.

“Practically the only difficulty in the distinction is introduced by our complex statutes which have half obliterated the lines between them, by transformations from one category into another and back again. Even this would be of little importance, were it not that there are some very substantial differences between our rights in prosecuting an action, and our rights in prosecuting a special proceeding. The regulations differ more or less in regard to the service of some papers, the subjects of motions and orders, subpœnas, depositions, discovery of books and papers, amendment, abatement and continuance, and in some cases as to appeal and costs. Hence, the following suggestion of the points of departure may be useful.

“The ordinary proceedings in an action sometimes branch out into a special proceeding, and in pursuing that branch the practitioner must not forget that he has crossed the line of demarcation.

“On the other hand there are a number of special proceedings which at one stage or another are, so to speak, transmuted into actions, or subjected to the regulations applicable to actions, by reason of special provisions of statutes which, with the innocent intention of simplifying the practice, declare, sometimes in one form and sometimes in another, that a special proceeding shall be from such a point, or in such a respect subject to the provisions regulating actions.”

Ingraham, J., in *McLean v. Jephson*, 26 Abb. N. C. 40, 13 Supp. 834, refers to the provisions of section 3333, defining an action, and also to the succeeding section, 3334, providing “That every other prosecution by a party for either of the purposes specified in the last section is a special proceeding.” He then calls attention to the fact that section 416 provides that a civil action is commenced by the service of a summons, and holds

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that the proceeding in question not having been commenced by the service of a summons was not an action, but that it was a prosecution in a court of justice by a party against another party for the enforcement of a right and therefore is a special proceeding within the provisions of the section defining such proceedings. Kennedy, J., in *Hallock v. Bacon*, 21 Civ. Proc. 255, says that the definition of Special Proceedings in the Code is sufficiently broad to include every possible case coming within it, whether the right of the party is created by the Revised Statutes or the Code itself.

What is a Special Proceeding is considered in *Matter of Cooper*, 22 N. Y. 67, as defined under the former Code. The court holds that as the proceeding could not by any possibility be an action, it is a special proceeding, provided it is a remedy at all. The court quotes the remark of Johnson, J., in *Belknap v. Waters*, 11 N. Y. 477, as follows: "The Code, unfortunately, has not furnished us with a definition of a remedy except in so far as one can be drawn from its distribution of all remedies into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or for an order as a remedy. According to this interpretation, which I deem just, the application of the appellant to the Supreme Court was clearly a remedy. If we take the definition of the word 'remedy' given by lexicographers the result is the same. Bouvier defines a remedy to be 'the means employed to enforce a right or redress an injury.'"

In *Matter of Ryers*, 72 N.Y. at page 4, Folger, J., speaking for the court, says: "It is a statutory, and, therefore, it is a special proceeding."

What constitutes special proceedings is discussed in *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521, opinion by Bartlett, J., at page 526.

In considering what constitutes a special proceeding in *Matter of Rafferty*, 14 App. Div. 55, after referring to the definition of civil action, the court says: "Every other civil remedy is defined to be a special proceeding." The action is commenced by the service of a summons in some one of the modes prescribed by law, and it is plain that no proceeding can be an action unless it be such that can be commenced by the service of a summons on the opposite party; and pleadings—that is, the allega-

 Art. 2. General Provisions of the Code Relating to the Subject.

tions of the cause of action on the one side, and, unless there be default, of the defence upon the other, are incidents to every action. *Roe v. Boyle*, 81 N. Y. 305.

It is said in *Matter of Lima, etc., Railway Co.*, 68 Hun, 253, that a motion is defined by sections 767 and 768 of the Code, and per Dwight, P. J., it is *held*: "By that definition the order is a direction of the court or judge made in an action or special proceeding, and the application for such order is a motion. This, we think, indicates the characteristic which distinguishes a motion as an application in a proceeding, namely, that a motion is an application in a proceeding by action or otherwise already pending, or about to be commenced, upon which it depends for jurisdiction. Whereas the special proceeding is an independent prosecution of a remedy in which jurisdiction is obtained by original process. . . . A special proceeding is the prosecution of a remedy by original process, and independently of any other proceeding, which is opposed to the definition of a motion." Citing *Reusselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145; *Matter of Jetter*, 78 N. Y. 601; *Matter of Long*, 39 St. Rep. 892; *Matter of Holden*, 126 N. Y. 589. For further citations as to what constitutes a Special Proceeding, see Appeals, Art. V., this chapter; also, Art. III.

ARTICLE II.

GENERAL PROVISIONS OF THE CODE RELATING TO THE SUBJECT. §§ 340, sub. 4, 342, 348, 25, 26, 37, 44, 52, 53, 414, 433, 716, 815, 825, 860, 867, 1688, 1777, 1814, 1900, 2516, 2517, 2861, 2868, 3150, 3152, 3316, 3352.

SUB. 1. JURISDICTION OF SPECIAL PROCEEDINGS. §§ 340, sub. 4, 342, 348, 25, 26, 37, 44, 52, 53.

§ 340. [Am'd, 1895.] Jurisdiction.

The jurisdiction of each county court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provision:

4. To the custody of the person and the care of the property, concurrently with the Supreme Court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness; and to every special proceeding, which the Supreme Court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person, or for the sale or other disposition of the real property situated within the county of

Art. 2. General Provisions of the Code Relating to the Subject.

a person, wherever resident, who is so incompetent for either of the reasons aforesaid, or who is an infant; or for the sale or other disposition of the real property, situated within the county, of a domestic religious corporation.

L. 1895, ch. 946; Co. Proc. § 30, part of sub. 1, as am'd 1870, ch. 467, § 1.

§ 342. [Am'd, 1877.] Action, etc., wherein county judge is incapable to act.

If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the Supreme Court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the Supreme Court within the same judicial district. The Supreme Court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must, make an order removing it to the Supreme Court. Thereupon the subsequent proceedings in the Supreme Court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court.

§ 348. When jurisdiction, etc., co-extensive with Supreme Court.

Where a county court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power, and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case, and may enforce its mandates in like manner as the Supreme Court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the Supreme Court possesses, in a like action or special proceeding, brought in the Supreme Court.

§ 25. [Am'd, 1877.] No discontinuance by reason of vacancy, etc.

An action or special proceeding, civil or criminal, in a court of record, is not discontinued by a vacancy or change in the judges of the court, or by the re-election or re-appointment of a judge; but it must be continued, heard, and determined, by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case or exceptions, or make any return of proceedings, had before him while he was in office, and may be compelled so to do, by the court in which the action or special proceeding is pending.

2 R. S. 277, § 2.

§ 26. In New York, one judge may continue proceedings commenced before another.

In the city and county of New York and in the county of Kings, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of court, in an action or special proceeding pending in a court of record, may be continued from time to time, before one or more other judges

Art. 2. General Provisions of the Code Relating to the Subject.

of the same court, with like effect, as if it had been instituted or commenced before the judge, who last hears the same. (See § 771.)

§ 37. Causes tried elsewhere than at court-house.

The parties to an action or special proceeding, pending in a court of record, may, with the consent of the judge who is to try or hear it, without a jury, stipulate in writing, that it shall be tried or heard and determined, elsewhere than at the court-house. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk; and the trial or hearing must be brought on upon the usual notice, unless otherwise provided in the stipulation.

§ 44. No action or special proceeding abated, etc., by failure or adjournment of court.

When a term of * court fails or is adjourned, or the time or place of holding the same is changed, as prescribed in this chapter, an action, special proceeding, writ, process, recognizance, or other proceeding, civil or criminal, returnable, or to be heard or tried, at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear, and all proceedings must be had, at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held, as originally appointed.

§ 52. Substitution of one officer for another in special proceedings.

In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer, before whom a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county, before an officer in an adjoining county, who would originally have had jurisdiction of the subject-matter, if it had occurred or existed in the latter county.

§ 53. Proceedings before substituted officer.

At the time and place specified in a notice or order, for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the notice to be given, as prescribed in this section, the officer substituted as prescribed in the last section, or in any other provision of law, to continue a special proceeding instituted before another, may act, with respect to the special proceeding, as if it had been originally instituted before him. But a proceeding shall not be taken before a substituted officer, at a time or place, other than that specified in the original notice or order, until notice of the substitution, and of the time and place appointed for the proceeding to be taken, has been given, either by personal service or by publication in such manner and for such time as the substituted officer directs, to each party who may be effected † thereby, and who has not appeared before either officer. Where, after a hearing has been commenced, it is adjourned to the next judicial day, each day to which it is so adjourned, is regarded, for the purposes of this section, as the day specified in the original notice or order, or in the notice to appear before the substituted officer, as the case requires.

* The word "a" omitted by error in engrossing.

† Error in engrossing for "affected."

Art. 2. General Provisions of the Code Relating to the Subject.

The foregoing provisions of the Code, scattered through the various chapters and titles, are here grouped for convenience of reference in the order in which they appear therein, with other matters. As to power and jurisdiction of county courts in special proceedings, see Code of Civil Procedure, § 340, sub. 4. As to powers of Supreme Court, see § 217.

Where a judge has made an order to show cause in a proceeding which he is incompetent to hear on account of being an interested person, and has afterwards resigned, the matter is not properly in court for determination by his successor in office. *In re Reddish*, 18 St. Rep. 41, 2 Supp. 259. A county judge cannot make an order relating to the care, custody, or control of infants. *Williams v. Corey*, 46 Hun, 408; *People v. Parr*, 49 Hun, 473, 2 Supp. 263, 18 St. Rep. 315, affirmed, 121 N. Y. 679.

The provision of § 25 empowering a judge out of office to settle a case and exceptions or make a return of proceedings before him while in office does not enable him to decide an issue or motion; nor do the provisions of § 26 authorizing the continuation of certain proceedings commenced before one judge of the county court of New York or Kings before another judge of the same court. That relates to a proceeding before a judge out of court and has no application to an issue or motion in an action or special proceeding heard by the court; nor does § 52, which provides that "in case of the death, sickness, resignation, or other disability of an officer before whom a special proceeding has been instituted, it may be continued before his successor." *Matter of Mayor of New York*, 139 N. Y. 143, distinguishing *Kelly v. Chrystol*, 16 Hun, 242, and affirming *Matter of Mayor*, 69 Hun, 271.

The effect of § 44 is that if a term of the court fails the court has power by statute to act at the next term of the court with the same effect that it could have done at the term which failed. *People v. Swales*, 33 Hun, 208.

The trial of an action was commenced before Mr. Justice Pratt on October 7, 1877, and continued until January 26, 1878, testimony being taken at various intermediate dates. The term of office of Mr. Justice Pratt expired December 31, 1877, but having been re-elected he commenced a new term January 31, 1878. No objection was made to proceeding with the trial by any of the parties at the time. *Held*, that no objection to the regularity of

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the proceedings could be raised after judgment therein. *Kelly v. Christal*, 16 Hun, 242, affirmed, without passing on this point, 81 N. Y. 619.

It was held, of a provision similar to § 26 under the old Code, in superior court, that proceeding commenced in the first judicial district by any judge competent to institute it therein, might be continued in such district before any other judge competent to have commenced it. *Dresser v. Van Pelt*, 15 How. 19; S. C. 6 Duer, 687.

The application of a sheriff to fix the fees in an attachment case is a continuation of the attachment proceeding, and the hearing could, in New York city, be had before a judge other than the one who issued the attachment, by virtue of this provision. *Woodruff v. Imperial Fire Insurance Co.*, 90 N. Y. 521.

Contested motions requiring notice cannot be heard at a Special Term adjourned by the justice holding it to his chambers, unless by consent of all the parties. The section is a substitute for § 41, chapter 470, Laws of 1847. *Matter of Wadley*, 29 Hun, 12. The language of § 41 is construed in *People v. Swales*, 33 Hun, 208.

Where a special proceeding is pending before a county court, the county judge whereof is disqualified from acting, he cannot make an order directing it to be heard before a justice of the Supreme Court, but should make and file with the county clerk a certificate of disqualification. A proceeding pending in a county court cannot be continued before a justice of the Supreme Court, but must be removed into the Supreme Court. *Matter of Village of Rhinebeck*, 19 Hun, 346. It was held before the Code that where a county judge was interested, he might request another county judge to hold the court. *Matter of Ryers*, 10 Hun, 93. The language of this section seems to be mandatory.

SEE 2. MISCELLANEOUS REGULATIONS APPLICABLE TO SPECIAL PROCEEDINGS. §§ 414, 433, 716, 815, 825, 860, 867, 1688, 1777, 1814, 1900, 2516, 2517, 2861, 2868, 3150, 3152, 3316, 3352.

§ 414. Cases to which this chapter applies.

The provisions of this chapter apply, and constitute the only rules of limitation applicable to a civil action or special proceeding except in one of the following cases:

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.
2. A cause of action or a defence which accrued before the first day of July, 1848. The statutes then in force govern, with respect to such a cause of action or defence.

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3. A case, not included in the last subdivision, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases, the provisions of law applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, when this act takes effect.

The word, "action," contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.

§ 433. Service of process, etc., to commence a special proceeding.

The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

§ 716. [Am'd, 1895.] Certain receivers may hold real property.

A receiver, appointed by or pursuant to an order or a judgment, in an action in the Supreme Court or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

§ 815. Bonds, etc., not affected by change of parties.

A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties.

§ 825. Papers in special proceedings; where to be filed.

A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the Supreme Court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.

§ 860. Witness exempt from arrest.

A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

§ 867. [Am'd, 1879.] Production, etc., of book of account.

A person shall not be compelled to produce, upon a trial or hearing, a book of account, otherwise than by an order requiring him to produce it, or a subpoena *duces tecum*. Such a subpoena must be served at least five days before the day when he is

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required to attend. At any time after service of such a subpœna or order, the witness may obtain, upon such a notice as the judge, referee, or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpœna or the order for production, upon such terms as justice requires touching the inspection of the book or any portion thereof, or taking a copy thereof or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause, and authorized to hear testimony. A justice of the peace, or other judge of a court not of record, may make such an order in an action brought in his court, at any time after the commencement thereof.

§ 1688. When special proceeding to recover real property not allowed.

A special proceeding to recover real property cannot be taken, except in a case specially prescribed by law.

§ 1777. Misnomer, when waived.

In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

§ 1900. Action for suing, etc., in name of another. Made also a misdemeanor.

If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court of record, or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months.

§ 2516. Proceedings to be commenced by citation.

Except in a case where it is otherwise specially prescribed by law, a special proceeding in a surrogate's court must be commenced by the service of a citation, issued

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upon the presentation of a petition. But upon the presentation of the petition, the court acquires jurisdiction to do any act, which may be done before actual service of the citation.

See §§ 2525 and 2533.

§ 2517. Id. ; within the statute of limitations.

The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition, must, within sixty days thereafter, be served, as prescribed in § 2520 of this act, upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made, pursuant to an order made as prescribed in § 2522 of this act.

§ 2861. Justice's jurisdiction must be specially conferred by law.

A justice of the peace has such jurisdiction in civil actions and special proceedings, as is specially conferred upon him by a statute, and no other.

§ 2868. [Am'd, 1897.] Justices to hold court; general powers.

A justice of the peace must hold, within his town or city, a court for the trial of any action or special proceeding, of which he has jurisdiction, brought before him; but such a court shall not be held in a building in any part of which trafficking in liquors is authorized. He must hear, try, and determine the same, according to law and equity; and for that purpose, where special provision is not otherwise made by law, the court is vested with all the necessary powers possessed by the Supreme Court.

§ 3150. Transfer of action when justice's term expires, etc.

If the term of office of a justice of the peace is about to expire, or he is about to remove from the town or city, before judgment is rendered in an action, or a final order is made in a special proceeding, pending before him, he must previously make a written order, reciting the fact, and directing the action or special proceeding to be continued before another justice of the same town or city, named in the order.

§ 3152. Proceedings upon transfer.

Where an order is made, as prescribed in either of the last two sections, the constable must forthwith take it and all other papers in the action, with the body of the defendant, if he is under arrest, before the justice named in the order. The plaintiff or petitioner must forthwith appear before that justice, who must take cognizance of the action or special proceeding, and must proceed therein as if it had been commenced before him. Costs, recovered in the action or special proceeding, include the fees allowed by law, for services performed by the constable and the justice, before the transfer, together with the fees allowed by law, for the proceedings before the justice to whom the cause is transferred.

§ 3316. Juror's fees in special proceedings.

A trial juror, sworn in a special proceeding, before a judge of a court of record; or upon a writ of inquiry; or upon a trial, before a sheriff, of a claim to personal property, seized by virtue of a warrant of attachment or an execution; is entitled to twenty-five cents, to be paid by the person at whose instance the jury is impanelled.

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§ 3352. Effect of this act, upon proceedings taken, or rights accrued, etc., under former statutes.

Nothing contained in any provision of this act, other than in chapter fourth, renders ineffectual, or otherwise impairs, any proceeding in an action or a special proceeding, had or taken, pursuant to law, or any other lawful act done, or right, defence, or limitation, lawfully accrued or established, before the provision in question takes effect; unless the contrary is expressly declared in the provision in question. As far as it may be necessary, for the purpose of avoiding such a result, or carrying into effect such a proceeding or other act, or enforcing or protecting such a right, defence, or limitation, the statutes in force on the day before the provision takes effect are deemed to remain in force, notwithstanding the repeal thereof.

ARTICLE III.

SOME SPECIAL PROCEEDINGS ENUMERATED.

The following are some of the numerous decisions holding what are, and what are not, special proceedings; there are doubtless numerous others of the same character, but it is difficult to collate them, as they are not to be found digested or collated under any single subject. The following are held to be special proceedings: An application for admission to practise as an attorney. *Matter of Cooper*, 22 N. Y. 67, more fully as *Matter of Graduates*, 11 Abb. 301. Application to assess damages under Plankroad and Turnpike Act. *In re Fort Plain and Cooperstown Plankroad Co.*, 3 Code R. 148. Proceedings to assess damages for a local improvement. *King v. Mayor of New York*, 36 N. Y. 182. Motion to set aside confession of judgment for defect in statement. *Belknap v. Waters*, 11 N. Y. 477. Petition to compel infant heirs to perform their ancestor's contract. *Hyatt v. Seeley*, 11 N. Y. 52. Proceedings to compel the support of poor relations. *Haviland v. White*, 7 How. 154. Appeal before referees in highway proceedings. *People v. Albright*, 23 id. 306; *Flake v. People*, 14 id. 527. *Contra*, *People v. Heath*, 20 id. 304; see *People v. Strevell*, 15 Week. Dig. 88. Proceedings supplementary to execution. *Gould v. Chapin*, 4 How. 185; *Smith v. Tozer*, 3 State Rep. 164; *Jones v. Sherman*, 8 id. 344. Proceedings under the General Assignment Acts. *Matter of Thorn*, 10 Daly, 71; *Matter of Potter*, 8 State Rep. 261. Certiorari. *People v. Jacobs*, 5 Hun, 428, affirmed, 66 N. Y. 8.

A proceeding by attachment against an attorney to compel the payment to the county treasurer of surplus money in an action of foreclosure in which he acted as attorney for the peti-

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tioners, is a special proceeding and the costs are properly allowed, as in a special proceeding. It is not a mere motion in the foreclosure suit. *Matter of Silvernail*, 45 Hun, 575; *People v. Stilwell*, 19 id. 531; *People v. Board of Commissioners of Taxes and Assessments*, 76 id. 64. A proceeding to vacate an assessment. *Matter of Manhattan Savings Institution*, 82 N. Y. 142; *Matter of Protestant Episcopal School*, 86 id. 396. But see *Matter of Jetter*, 78 id. 601. Mandamus. *People v. Supervisors of Richmond*, 28 N. Y. 112; *People v. Board of Supervisors*, 65 How. 327. Proceedings for contempt. *Holstein v. Rice*, 15 Abb. 307; *Gray v. Cook*, id. 308; *Woolf v. Jacobs*, 5 Hun, 428; *Erie Railway v. Ramsay*, 45 N. Y. 637; *Hart v. Johnson*, 7 State Rep. 133. But not for criminal contempt. *People v. Gilmour*, 88 N. Y. 626. Petition by creditor for leave to begin an action against a lunatic. *Williams v. Estate of Cameron*, 26 Barb. 172. Proceedings to change location of toll-gate. *McAllister v. Albion Plankroad Company*, 11 Barb. 611. Proceedings to condemn land for water purposes. *Matter of Waverly Water-Works*, 16 Hun, 57.

Proceedings to appraise lands for railroad purposes under the General Railroad Act. *In re N. Y. Central R. R. Co.*, 11 N. Y. 276; *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 id. 145; *Matter of N. Y., W. S. & B. R. R. Co.*, 34 Hun, 233; *A. & S. R. R. Co. v. Dayton*, 10 Abb. (N. S.) 182; *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 Hun, 592; *Matter of N. Y. & Harlem R. R. Co.*, 98 id. 12; *Matter of Cortland, etc., Horse R. R. Co.*, 98 N. Y. 336. See brief of counsel for respondent, page 339. Prohibition. *People v. Common Pleas*, 43 Barb. 278. Summary proceedings to recover possession of land. *People v. Boardman*, 4 Keyes, 59; Habeas corpus. *Matter of Barnett*, 11 Hun, 468. Reference to ascertain the rights of parties in surplus on statutory foreclosure. *Elwell v. Robins*, 43 How. 108; *Matter of Gibbs*, 58 id. 502; *Mutual Life Ins. Co. v. Anthony*, 23 Week. Dig. 427. A proceeding to procure the settlement of the accounts of a deceased trustee, and the appointment of a successor which is neither commenced nor prosecuted by a summons and complaint. *Matter of Simpson*, 26 Hun, 459; *In re Livingston*, 34 N. Y. 555. A proceeding to compel a special guardian to account. *Spelman v. Terry*, 74 id. 448. A proceeding for the relief of imprisoned debtors. *In re Brady*, 69 id. 215. A proceeding to remove a guardian. *Matter of King*, 4 id. 570. The probate of a will.

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Matter of Gates, 26 Hun, 181. An application to enforce the liability imposed by statute, declaring an assignee of a cause of action, or one beneficially interested in the recovery, liable for the costs of an action. *Marvin v. Marvin*, 78 N. Y. 541. An application to compel a receiver to pay over moneys. *People v. Bank of Rochester*, 96 id. 32. Proceedings by commissioners of assessment to extend a street in city of New York. *Matter of Mayor, etc.*, 27 St. Rep. 188. An application for an order under the Election Law overruling the decision of an officer with whom the certificates of nomination of a candidate are filed as to the validity thereof. *Matter of Mitchell*, 81 Hun, 401.

Proceedings for condemnation of land are special proceedings, and terminate in a final order and not in a judgment. *Matter of the Board of Education of the City of Brooklyn*, 19 Civ. Pro. 420. (See present Condemnation Law.)

Supplementary proceedings are special proceedings, and under the provisions of the Code, it was clearly intended that they could be maintained on a justice's judgment at any time within ten years. *Bolt v. Hauser*, 19 Civ. Prov. 7; *Smith v. Tozer*, 11 Civ. Pro. 349. A proceeding brought by one holding mortgages upon the shares of two of the defendants, in an action for partition commenced after entry of interlocutory judgment for the sale of the premises upon a motion in which an order of reference was made to ascertain and report, is a special proceeding. It is not an action, nor, as the mortgagee is not a party to the partition action, is it a motion in the action. *Byrnes v. Labagh*, 12 Civ. Pro. 417. An order punishing a party to an action as for a contempt is not an order made in a proceeding in the action, within the provisions of the Code as to appeal from an order made in an action, but is an order made in a special proceeding. *Sudlow v. Knox*, 7 Abb. Pr. N. S. 411.

A proceeding to punish defendant for contempt to enforce a civil remedy instituted by an order to show cause is a proceeding in an action, not a special proceeding; under §§ 2273-2283, an order to show cause is equivalent to a notice of motion, and the subsequent proceedings are in the action. *Ray v. N. Y. Bay Extension Company*, 155 N. Y. 102, dismissing appeal from 20 App. Div. 530; *Jewellers' Mercantile Agency v. Rothschild*, 155 N. Y. 255, following *Pitt v. Davison*, 37 N. Y. 235.

As to when a proceeding to punish for a contempt is, and when

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not a special proceeding, see *Batterman v. Finn*, 40 N. Y. 340; *Brinkley v. Brinkley*, 47 N. Y. 40; *N. Y. & N. H. R. Co. v. Ketcham*, 3 Abb. Decs. 347; *Woodhouse v. Woodhouse*, 5 Redf. 131; dissenting opinion in *Matter of Nichols*, 54 N. Y. 62, 70-74. Proceedings for opening of a street under the charter of the city of New York are special proceedings wherein a final judgment is a conclusive adjudication of the rights of all parties interested. *Matter of the Opening of 163d Street*, 61 Hun, 365, 40 St. Rep. 684, appeal dismissed, 131 N. Y. 569. An application for an order appointing commissioners to appraise the damages caused by the extension of a street is a special proceeding from the order made in which an appeal may be taken. *Matter of South Market St., in Johnstown*, 80 Hun, 246.

Proceedings for the removal of a justice of the peace are special proceedings, and the order therein is a final order affecting a substantial right. *Matter of King*, 130 N. Y. 602. An application to strike names from the registry of voters, under the Election Law, is regarded as a special proceeding in *Matter of the Registration of Lyman C. Ward*, 48 St. Rep. 613-619. An order appointing commissioners of appraisal under the Condemnation Law is an order made in a special proceeding. *Matter of Broadway and 7th Av. R. Co.*, 69 Hun, 275.

An application to the Special Term under § 11 of article 1 of the General Railroad Law (ch. 565, Laws 1890), by a railroad for authority to construct its road upon a street in an incorporated village, is a special proceeding. *Matter of Lima, etc., R. Co.*, 68 Hun, 252. It is said in the opinion, that the definition of a special proceeding under the Code does not purport to be exhaustive; it declares that certain prosecutions are special proceedings, but it does not exclude all other proceedings from the same category. Citing *Rehns. & Saratoga R. Co. v. Davis*, 55 N. Y. 145; *Matter of Jetter*, 78 N. Y. 601; *Matter of Long*, 39 St. Rep. 892; *Matter of Holden*, 126 N. Y. 589.

Condemnation proceedings by a street surface railroad corporation to extend its lines are not, in the strict sense of the term, condemnation proceedings to acquire title to land, but are regarded as special proceedings. *Hornellsville, etc., R. Co. v. N. Y. L. E. & W. R. Co.*, 83 Hun, 407-412, citing *Matter of Lockport & B. R. R. Co.*, 77 N. Y. 557; *Buffalo, etc., R. Co. v. N. Y. L. E. & W. R. Co.*, 72 Hun, 583.

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Query. As to whether an application to the Supreme Court to appoint a successor to a deceased testamentary trustee, is a special proceeding; see *Loscy v. Stanley*, 83 Hun, 420, reversed without passing on this question, 147 N. Y. 560. A proceeding instituted by a trustee of a trust fund for leave to resign, and for leave to procure the appointment of a new trustee, is a special proceeding. *Matter of Holden*, 126 N. Y. 589.

An order by a justice of the Supreme Court, refusing to revoke an approval theretofore given by him to an order of the State Commission in Lunacy, is not an order in a special proceeding. It is not the prosecution for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. *Matter of the Application for an Order Vacating the Approval of the Order Directed by the State Commission in Lunacy to the Board of Commissioners of Charities and Corrections in Kings County*, 76 Hun, 74.

Proceedings to enforce a claim against the estate of a decedent, disputed, and referred under the statute, are no longer special proceedings under the Code. *Lee v. Lee*, 85 Hun, 588. Summary proceedings are especially designated as special proceedings by § 2235 of the Code. *Dorschel v. Burkly*, 18 Misc. 240. A proceeding to change the place of trial of a criminal action is a matter outside of that action, and not a necessary part of the criminal action, and is within the definition of the Code of a special proceeding. *Peo. v. McLaughlin*, 2 App. Div. 408. The taking of property in a street widening proceeding by grade crossing commissioners in Buffalo is a special proceeding. *Matter of Grade Crossing Commissioners*, 20 App. Div. 271. Proceedings taken under the General Municipal Law (Laws 1892, ch. 685, § 31, by resident freeholders of a village, who claim that its officers are unlawfully expending the moneys raised by taxation therein, and ask for an investigation, is a special proceeding. *Peo. ex rel. Guibord v. Kellogg*, 22 App. Div. 177, citing *Matter of Cooper*, 22 N. Y. 67; *Matter of Reyers*, 72 N. Y. 1; *Marvin v. Marvin*, 78 N. Y. 541; *Matter of King*, 130 N. Y. 602-606; *Matter of Emmett*, 150 N. Y. 538-541.

A proceeding taken by the city of New York under the Consolidation Act to acquire lands under the right of eminent domain is, within the definition of the Code, a special proceeding, and should be heard as such proceedings are ordinarily heard,

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although no particular method of procedure is prescribed by that act. *Matter of the Mayor*, 22 App. Div. 124.

In *Matter of Emmett*, 150 N. Y. 538, it was held that an order made under the Election Law (Laws 1896, ch. 909, § 56), reviewing the determination of the filing officer upon a contested certificate of nomination, is a special proceeding.

In the *Peo. v. St. Nicholas Bank of N. Y.*, 150 N. Y. 563, it was held that an order of the Special Term overruling exceptions to the report of a referee appointed under the statute (2 R. S. 45, as amended by ch. 373, Laws 1862), to determine a controversy between a claimant and the receiver of a bank, was not a special proceeding within the provisions of the Constitution. Citing *Peo. v. Am. L. & T. Co.*, 150 N. Y. 117, holding that an order of the appellate division, affirming an order directing the permanent receiver of a corporation appointed by final judgment in the action, to pay the claim of a creditor of the corporation, was not an order finally determining the action or special proceeding.

Proceedings taken to acquire land by the city of Brooklyn, under ch. 481, Laws 1892, are special proceedings. *Matter of the Application of the City of Brooklyn for Authority to Acquire Property from the Long Island Water Supply Co.*, 148 N. Y. 107.

It was held that a proceeding by the attorney-general under ch. 383 of the Laws of 1897, an act designed to prevent monopolies in articles and commodities in common use, for an order for the examination of witnesses for the purpose of determining whether an action should be commenced under the act, was a special proceeding. *Matter of the Attorney-General*, 22 App. Div. 285. The contrary was held, however, on appeal, 155 N. Y. 441, and it was said that the order of the appellate division affirming the order vacating the order for the examination of witnesses and granted *ex parte*, by a justice of the Supreme Court under section 5 of the act to prevent monopolies, was not an order finally determining a special proceeding. Citing *Rochester Lamp Co. v. Brigham*, 1 App. Div. 490, to the point that an order for the examination of witnesses before trial, but after the action brought, was clearly an order in an action. The court also cited to the same point, *Van Arsdale v. King*, 155 N. Y. 325.

In *Peri v. N. Y. C. R. R. Co.*, 152 N. Y. 521, it is held that a proceeding by an attorney to enforce his lien upon his judgment is a special proceeding even though entitled in the action.

 Art. 4. Costs in Special Proceedings.

ARTICLE IV.

COSTS IN SPECIAL PROCEEDINGS. §§ 3240, 3258, 3259, 3279.

§ 3240. [Am'd, 1881.] Costs; in a special proceeding.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

§ 3258. When defendant entitled to increased costs.

In either of the following cases, a defendant, in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a State writ, is entitled to recover the costs, prescribed in § 3251 of this act, and in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the State, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act, done by him by virtue of his office, or an alleged omission by him, to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance, touching the duties of the office or appointment.

3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the State.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

2 R. S. 616, § 24.

§ 3259. Increased disbursements not allowed.

The increase, specified in the last section, does not extend to the disbursements; and an officer, witness, or juror, is not entitled to any other fees in the action, except the single fee allowed by law for his services.

§ 3279. This title applies to special proceedings.

The foregoing sections of this title apply to a special proceeding instituted in a court of record, in like manner as to an action; for which purpose, the prosecuting party, other than the people, or, where the special proceeding is instituted in the name of the people upon the relation of a private corporation or individual, the relator is deemed a plaintiff, and the adverse party a defendant.

The allowance of costs in special proceedings rests in the discretion of the court, except when the right to them is expressly given by statute. *Matter of Potter*, 8 State Rep. 261. Costs in special proceedings are in the discretion of the tribunal hearing and deciding the case. If allowed, they must be at the rate allowed for similar proceedings in civil actions. *People v. Fire Commissioners*, 5 Abb. N. C. 144; *Matter of Protestant Episcopal*

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School, 86 N. Y. 396; 24 Hun, 367. But no costs are allowable in proceedings for a criminal contempt. *People v. Gilmore*, 88 N. Y. 626. A court has no power to grant allowances in special proceedings; it can only allow costs at the rates allowed for similar services in an action brought in the same court, and in like manner. *Matter of Simpson*, 26 Hun, 459. In proceedings to punish for a contempt, where the party acted in good faith and in accordance with what he believed to be his duty, only motion fees and disbursements can be taxed as costs. *People v. Cooper*, 20 Hun, 486.

Where proceedings are instituted by a railroad company under the laws of this State, and after report by commissioners making their award, and before confirmation, the railroad moves for leave to discontinue and abandon the proceedings, it is within the legitimate power of the court in granting it to annex such terms to go with the favor, as, under the circumstances, justice and fairness to the parties require. The terms upon which the motion should be granted are within the discretion of the court. While the provisions of the statute relating to extra allowances do not apply to special proceedings, and such an allowance cannot be made under an order giving costs, but in such cases the limitations "for similar services, as in actions," controls, yet that restriction has no application on a motion for favor. The court in granting such a motion is not restricted to costs and disbursements as a condition. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190. A proceeding under the General Railroad Act is a special proceeding, but is more analogous in its purpose and scope to an action than to a motion, and the court is justified in allowing full costs as in an action. *Matter of Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145. The general rule is, that, in proceedings to acquire land under the General Railroad Act, costs are to be awarded under the provisions of this section, it being a special proceeding. *Matter of Lackawanna, etc., R. R. Co.*, 26 Hun, 592. Where commissioners were appointed without opposition, and a hearing had at which witnesses subpoenaed by the landowner were sworn and examined as to the value of the land, it was held there was no issue made, and as no question of fact had been raised or tried, no trial fee should be allowed. Where an order confirming a referee's report on reference out of Surrogate's Court, directed that defendant have

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judgment for costs and disbursements as in an action, it is not error for the clerk to tax costs as in an action. The court has power to award costs "as in actions brought in the same court." *Hearn v. Sullivan*, 13 Abb. N. C. 371.

It was held in *Matter of Durham*, 49 Super. Ct. 487, that the Code leaves the question of awarding or denying costs in special proceedings to the discretion of the court. The discretion contemplated by the law is not a mere unreflecting caprice, exercised in violation of right, but a judicial discretion to be used according to the rules of a court of equity. Proceedings taken by creditors and others under the Assignment Acts are special proceedings (citing §§ 3333, 3334, 3343, sub. 20), and costs may be allowed in them as in a special proceeding. *Matter of Thorn*, 10 Daly, 71. Where, upon an appeal from the decision of a surrogate, denying a petition to compel the payment of legacies, on the ground that the claim is barred by the Statute of Limitations, the General Term affirms the judgment, it may, under this section, allow costs at the same rates allowed for similar services in an action brought in the same court in the same manner. *Cole v. Terpenning*, 27 Hun, 111. But on an appeal from an order dismissing a petition and citation requiring the respondents to show cause why they should not file an inventory, costs were allowed of a motion, as in similar proceedings in the Supreme Court. *Walsh v. Van Allen*, 36 Hun, 629. Where an order of a surrogate granting leave to issue execution on a judgment after the death of the judgment debtor is affirmed with costs at General Term, the successful party is entitled to enter and docket a judgment of affirmance establishing the surrogate's decree and awarding costs as in an action for similar services, and to issue execution thereon. *Wadley v. Davis*, 38 Hun, 186.

The fact that a matter is a special proceeding does not prevent the allowance of necessary expenditures as disbursements. *Matter of Department of Public Parks*, 27 Hun, 305. Upon the coming in of a referee's report dismissing the petition of a third person praying that a judgment of divorce be vacated, and awarding to plaintiff \$350 as compensation for disbursements and counsel fees, to be paid by the petitioner, it was held that, in so far as the order awarded the said compensation to the plaintiff, such compensation being neither the costs of a motion, nor costs of a special proceeding, but being a gross sum allowed as compen-

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sation for disbursements and counsel fees in the proceeding, it should be reversed. *Simmons v. Simmons*, 32 Hun, 551. This section does not regulate the costs in summary proceedings to recover the possession of land before a justice of the peace on reversal by the county court. Sections 2260 and 3066 granting costs, as of course, are applicable. *Harrison v. Swart*, 34 Hun, 259. The costs on reversal of an order directing a commitment for contempt in supplementary proceedings are but \$10 and disbursements. *Jones v. Sherman*, 8 State Rep. 344.

In proceedings instituted under chapter 338, Laws of 1858, where the Special Term vacated the assessment with costs to the applicant, from which order no appeal was taken, and costs were stricken out by the General Term, on appeal from an order of the Special Term denying an order to strike out, it was held that the applicant was entitled to costs at the rate allowed for similar services in actions, and the order of the General Term reversed. *Matter of Jetter*, 78 N. Y. 601. Costs are allowable on an application to enforce the liability imposed by the statute, declaring the assignee of a cause of action, or one beneficially interested in the recovery, liable for the costs of an action brought by him in the name of another, as in a special proceeding. *Marvin v. Marvin*, 78 N. Y. 541. Proceedings for the obtaining of surplus moneys arising from statutory foreclosure of mortgage is a special proceeding, and the costs allowed should be necessary disbursements and motion costs. *Matter of Gibbs*, 58 How. 502. In *Elwell v. Robbins*, 43 id. 108, it was held that two motion fees might be allowed in such proceedings, one on appointment of referee, the other on confirmation of the report. That only disbursements and motion costs are allowable, is held in *Wellington v. Ulster Ice Co.*, 5 Week. Dig. 104; *Helrauk v. Colwell*, 2 Law Bull. 39, and *McDermott v. Hennesy*, 9 Hun, 59. Costs may be allowed on *habeas corpus* under this section, although they will not be granted if reasonable cause for the writ exists, but when on *habeas corpus* for an infant a reference is ordered, witnesses are examined, and a decision rendered upon a hearing, costs will be allowed in the discretion of the court. *Matter of Barnett*, 11 Hun, 468. Where relator was arrested upon an execution, and the arrest was questioned on *habeas corpus*, it was held that only costs for proceedings after petition, and for trial and the disbursements could be taxed. *Muller v. Bowe*, 4 Law Bull. 10. Under the

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former Code costs were allowed on summary proceedings to compel a party to support a relative when brought by *certiorari* from the Court of Sessions to the Supreme Court for review. *Haviland v. White*, 7 How. 154. The following decisions were made, also, under the old Code as to costs on *certiorari*. In *People v. McDonald*, 69 N. Y. 362; *People v. Board of Police*, 39 id. 506; *People v. Village of Nelliston*, 79 id. 638, it is held costs are not allowable on a common-law *certiorari*. In *People v. Van Alstyne*, 3 Keyes, 35 (1866), it is said: "There was formerly some diversity of opinion as to the authority of the courts to award costs on appeals to the prevailing party on a common-law *certiorari*. We have held that these cases belong to the class of special proceedings, embraced in the third section of the Code, and that such costs may be awarded in the appellate tribunal." Citing *People v. Wheeler*, 21 N. Y. 86; *People v. Stilwell*, 19 id. 532; *People v. Commissioners of Schodack*, 27 How. 158; *People v. Flake*, 14 id. 527. In *People v. Commissioners of Taxes and Assessments*, 76 N. Y. 64 (1879), it is said, as to the questions of costs on a common-law *certiorari*, there is a lamentable conflict of authority, but it has been settled in this court, as announced in *People v. McDonald*, 69 N. Y. 362, which holds costs are not allowable on a common-law *certiorari*. In *People v. Village of Nelliston*, 79 N. Y. 638, *supra* (1879), it is said, *per curiam*: "We have carefully considered the question of costs, and are of the opinion that the respondents should not have costs; their allowance was not in conformity with our actual decision. The costs on appeal here claimed were in a *certiorari* proceeding, and it matters not in what form the proceeding came before us, whether upon appeal from a judgment or from an order superseding the writ. As we have repeatedly decided, the costs are not allowable. In *People v. Smith*, 13 Hun, 227 (1878), the Supreme Court held the award of costs to be discretionary with the court, reviewing the cases then decided in the Court of Appeals. In *People v. Smith*, 24 Hun, 66, motion costs were allowed at General Term without question or discussion. But the question seems to be put at rest in *People ex rel. Smith v. Asten*, 101 N. Y. 651; s. c. 1 State Rep. 37; where, on *certiorari* to review the action of assessors under chapter 269, Laws of 1880, which relieves them from costs below, except in case of bad faith, the Court of Appeals held that on an appeal from such a determination which was heard and deter-

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mined in like manner as an order, costs were to be given or withheld in the discretion of the court, and denied a motion to amend the *remittitur* by striking out the allowance of costs. Proceedings to compel an accounting by a special guardian appointed to sell an infant's real property constitute a special proceeding, and where a question of facts is referred, the referee's fees might, under the former statute, be allowed as costs. *Spelman v. Terry*, 74 N. Y. 448. The costs to be allowed and which are recoverable upon an appeal from an order granting a peremptory mandamus, where such order is affirmed, are under § 3240, and in the discretion of the court, are the same costs which are given on an appeal from a judgment. *People ex rel. Bray v. Supervisors of Ulster*, 65 How. 327. Upon a peremptory mandamus being denied, no alternative writ having been granted, the costs are in the discretion of the court, and can only be granted at the same rate as on motion in a civil action. *People v. N. Y. Produce Exchange*, 64 How. 523.

On proceeding for discharge of debtor from imprisonment on execution, there can be no costs to respondent before notice, as the notice of the application is not only the institution of the proceedings, but the only notice of trial. He is entitled to costs after notice, and as the parties when in court are there for trial, a trial fee should be allowed whether the petition is dismissed for default in appearing to prosecute or upon the merits. *Matter of Davis*, 2 Law Bull. 96. A proceeding under the General Railroad Act by one railroad corporation to secure a crossing over the track of another railroad is a special proceeding, and the costs therein are in the discretion of the court. *Matter of Cortland, etc., Horse Railroad Company*, 98 N. Y. 336.

In summary proceedings to recover the possession of real property, a landlord being a non-resident, but owning property in the city and county of New York, cannot be required to file security for costs. The proceeding is not such a special proceeding instituted in a court of record as is contemplated by § 3279. It is a proceeding before a magistrate. *Hasler v. Johnston*, 59 How. 432.

Power to award costs in special proceedings is fixed and limited by § 3240, and under it a court has no power to grant extra allowances, it can only award costs in its discretion at the rate allowed for similar services in an action brought in

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the same court. *Matter of Holden*, 126 N. Y. 589, cited, *Matter of City of Brooklyn*, 148 N. Y. 107.

Although proceedings supplementary to execution are distinct special proceedings, under § 2433, yet the method of reviewing an order made therein and the practice relating thereto are the same as if an order had been made in an ordinary action. Upon reversal on appeal from the order adjudging defendant guilty of contempt made on a motion in supplementary proceedings, the costs are limited to \$10 and disbursements. *Jones v. Sherman*, 18 Abb. N. C. 461, 11 Civ. Proc. 416, citing *Phipps v. Carman*, 26 Hun, 518; *People v. Cooper*, 10 Week. Dig. 77.

Section 3240 refers only to such cases as are not otherwise provided for in the Code. *Matter of Wilson*, 103 N. Y. 374.

Where an appeal is taken from an order, judgment, or determination made in a proceeding instituted under chapter 269 of the Laws of 1880 for the review and correction of an erroneous, illegal or unequal assessment, costs are to be given or withheld in the discretion of the court under § 3239 of the Code. It seems that costs cannot be taxed as of course under § 3240. *People ex rel. Warren v. Carter*, 46 Hun, 444, followed, *People ex rel. Smith v. Commissioners Taxes and Assessments of the City of New York*, 101 N. Y. 651. The question of costs does not seem to have been passed upon by the Court of Appeals in *Remsen v. Wheeler*, 105 N. Y. 576.

A proceeding to acquire an easement in lands for the construction of a sewer in a city is a special proceeding, and costs may be allowed in the discretion of the court. *Matter of Wells Avenue Sewer*, 46 Hun, 534.

Where there has been a trial of an issue raised on a proceeding to acquire land for public purposes and an appeal is taken from the order granting the petition, the case is within § 3240 and costs may be properly allowed as in an action. *Matter of Application of Long*, 39 St. Rep. 892.

An application at Special Term under § 11 of Article 1 of the General Railroad Law by a railroad company for authority to construct a road upon a street in an incorporated village is a special proceeding, and costs as in an action are allowable in the discretion of the court. *Matter of Application of Lima & Honeoye Falls R. R. Co.*, 68 Hun, 252, 52 St. Rep. 186, followed and approved in *Hornellsville R. R. Co. v. N. Y., L. E., etc., R. R.*

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Co., 83 Hun, 407, citing *Matter of L. & B. R. R. Co.*, 77 N. Y. 557; *Buffalo, etc., R. R. Co. v. N. Y., L. E., etc., R. R. Co.*, 72 Hun, 583.

An application for a peremptory writ of mandamus is a special proceeding in which costs are discretionary. Unless the Court of Appeals indicates in its decision that it intends to award costs in the court below, the costs will be treated as of that court only. *People ex rel. v. N. Y., L. E. & W. R. R. Co.*, 47 Hun, 43.

It is a settled rule of practice not to allow costs in a special proceeding by an elevated railroad company to acquire lands. *Matter of Union Elevated R. R. Co.*, 55 Hun, 163.

In proceedings instituted by a taxpayer under the provisions of § 4 of chapter 907 of Laws of 1869, as amended by chapter 283 of Laws of 1871, no costs can be awarded by a county judge. *Matter of Petition of Hill v. Sheldon*, 55 Hun, 44.

Proceedings by a receiver of taxes to compel the payment of a personal tax begun by petition and order to show cause is a special proceeding, and where costs are allowed by the court to the defendant he is entitled to tax costs as allowed for similar services in an action. *McLane v. Jephson*, 26 Abb. N. C. 40.

Proceedings for leave to mortgage trust lands are special proceedings within the statute as to costs, and where objection has been made and it has been referred to a referee to take proof and report thereon and a hearing has been had before him, and upon his report a final order is made, it is a trial and costs before and after notice of trial and a trial fee are allowable. Such an order is a final order, and upon appeal from it costs are the same as upon an appeal from a judgment or determination. But printing the evidence taken before the referee is not making a case within the statute and an allowance of \$20 therefor is unauthorized. *Matter of Clarke*, 27 Abb. N. C. 144, distinguishing *N. Y. L. & W. R. R. Co.*, 26 Hun, 593, following *Matter of Jetter*, 78 N. Y. 601; *People v. City Bank of Rochester*, 96 N. Y. 32.

Where on appeal to the Court of Appeals from an order of the General Term of the Supreme Court modifying an order of Special Term made upon a hearing on *certiorari* to review an assessment, the order at both the General and Special Terms is reversed by the Court of Appeals and the assessment vacated,

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with costs to the relator, in all the courts, the relator is entitled not merely to the costs at General Term but also costs on appeal, and costs may be allowed at the same rates as for similar services in an action brought in the same court. *People v. Pratt*, 22 Civ. Pro. 294, following *In re Holden*, 126 N. Y. 589.

An affirmance by the General Term with costs of an order sustaining the action of excise commissioners in refusing to grant a license and dismissing writ of *certiorari* constitutes a direction by the court that the respondent recover costs of the appeal as in an action.

The increased costs given to public officers by § 3258 are not limited to costs incurred in the court of original jurisdiction, but extend to costs of appeal. Section 3248 which requires the certificate of the judge or referee to entitle a party to increased costs under § 3258 applies only to actions and has no application to special proceedings where costs are discretionary and first awarded by the General Term. *Wood v. Excise Commissioners*, 9 Misc. 507, 30 Supp. 344.

While § 3240 authorizes an award of costs in a special proceeding at the same rates allowed for similar services in an action, it does not empower the court to grant extra allowances. *Matter of Application of City of Brooklyn*, 88 Hun, 176, citing *Matter of Holden*, 126 N. Y. 589.

In 148 N. Y. 107, *Matter of City of Brooklyn* (*supra*) was affirmed. It was held, that in the absence of a statute providing for costs and allowances for expenses none can be recovered. That the authority given by § 3372 of the Code granting an extra allowance to defendant in condemnation proceedings does not apply or extend to a proceeding taken under a subsequent special statute. That the right to costs in condemnation proceedings taken under such statute containing no provisions for costs or allowances is governed by § 3240 of the Code.

This matter is also reported in 10 Misc. 650.

Proceedings taken by grade-crossing commissioners of Buffalo for the appointment of commissioners is a special proceeding, and costs rest in the discretion of the court. *Matter of Grade Crossing Commissioners*, 17 App. Div. 54; see, also, *Matter of Grade Crossing Commissioners*, 20 App. Div. 271.

The costs of an investigation into the financial affairs of a village under Laws 1892, chap. 685, § 3, if any are awarded,

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must be restricted by force of § 3240 to those allowed for similar services in an action. When the first opportunity to object to the costs of such an investigation, or to raise any question as to the amount, is afforded by the service or publication of a final order awarding costs, a party who then objects by appeal cannot be held guilty of laches, or be considered to have waived the right to question the allowance of costs. *Matter of Tax Payers of Plattsburgh*, 157 N. Y. 78, reversing 27 App. Div. 353.

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APPEALS. §§ 1356, 1357, 1358, 1359, 1360, 1361, 190, 191.

§ 1356. [Am'd, 1895.] **Appeal from order made in the same court.**

An appeal may be taken, to the appellate division of the Supreme Court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the Supreme Court; or made by a justice thereof, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to or continued before him.

L. 1854, ch. 270, § 1, first clause (4 Edm. 681; 5 id. 133); L. 1895, ch. 946.

§ 1357. [Am'd, 1895.] **Id.; when made by another court or judge.**

An appeal may also be taken to the appellate division of the Supreme Court, from an order, affecting a substantial right, made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before, the judge who made the final order. But this section does not apply to a case where an appeal from the order, to a court, other than the appellate division of the Supreme Court, is expressly given by statute.

Substituted for part of Co. Proc. § 344; L. 1895, ch. 946. See § 1342, *ante*.

§ 1358. [Am'd, 1877.] **Preceding order may be reviewed.**

An appeal, authorized by this title, brings up for review, any preceding order made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.

See Co. Proc. § 329.

§ 1359. **Limitation of time to appeal.**

An appeal, authorized by this title, must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or, if he appeared, upon the hearing, by an attorney-at-law or an attorney-in-fact, upon the person who so appeared for him.

From Id. § 332. See L. 1854, ch. 270, § 2.

§ 1360. **Stay of proceedings; hearing of appeal; decision thereupon.**

The provisions of title fourth of this chapter, relating to perfecting an appeal from

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an order, taken as therein prescribed; to staying the execution of the order appealed from; to hearing the appeal; and to the entry and enforcement of the order made upon the appeal, apply, where an appeal is taken, as prescribed in this title, except as otherwise specially prescribed by law.

This section refers to §§ 1351, 1353, 1354, and 1355, *ante*. See, also, §§ 1313 and 1314, *ante*.

§ 1361. This title qualified. Application of provisions relating to actions.

This title does not confer the right to appeal from an order, in a case, where it is specially prescribed by law, that the order cannot be reviewed. The proceedings upon an appeal, taken as prescribed in this title, are governed by the provisions of this act, and of the general rules of practice, relating to an appeal in an action, except as otherwise specially prescribed by law.

§ 190. [Am'd, 1895.] The jurisdiction of the Court of Appeals in civil actions.

The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a General Term of the Supreme Court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the Court of Appeals. From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the Court of Appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the Supreme Court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the Supreme Court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the appellate division its determination upon such questions.

Co. Proc. § 11, and L. 1895, ch. 946.

§ 191. [Am'd, 1895, 1896.] Limitations, Exceptions, and Conditions.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions, and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the Supreme Court, county court, or a surrogate's court, unless the appellate division of the Supreme Court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon, and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer,

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conveyance, assignment, or written instrument as in fraud of the rights of creditors, when the decision of the appellate division of the Supreme Court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals.

3. The jurisdiction of the court is limited to the review of questions of law.

4. No unanimous decision of the appellate division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals.

A proceeding to punish for contempt is a special proceeding, original in its character, and independent of the proceeding in which it arose. *Gibbs v. Prindle*, 11 App. Div. 470, citing *Erie Railway Co. v. Ramsey*, 45 N. Y. 637; *People ex rel. Grant v. Warner*, 51 Hun, 53.

In *People v. Young*, 92 Hun, 373, it is held that where an order was made in a special proceeding, although in a court of special sessions, it might, in view of the purpose of the motion, be deemed to be made in a civil special proceeding as distinguished from a criminal special proceeding, and to be appealable.

The Highway Law imposes no such limitation upon the right of appeal from the Special Term of the Supreme Court as in the case of the county court. *Matter of Barrett*, 7 App. Div. 482.

An appeal from an order made in special proceedings, like an appeal from an order made in an action, lies only when it affects a substantial right. *Held*, that an order that a writ of alternative mandamus issue is not appealable, as the writ of alternative mandamus is in the nature of an order to show cause, and does not affect a substantial right. *People ex rel. Ackerman v. Lumb*, 6 App. Div. 26.

An order adjudging a person in contempt is appealable under § 1356 of the Code. Section 2423 is not applicable to such cases. *Gibbs v. Prindle*, 9 App. Div. 29.

As the Election Law, although providing for a review of the decision of the filing officer, does not designate the method of procedure on such review, it may be had upon a motion made upon petition filed. A public officer, like the county clerk, has a right to institute proceedings for the review of an order commanding him to do an official act which he believes to be in violation of the statutes of the State, and the fact that he has no pecuniary interest in the matter does not affect the right. *Matter of Application of Cuddeback*, 3 App. Div. 103, followed in *Matter of Application of Williams*, 3 App. Div. 618.

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Sec, as to when an order in election cases is appealable, *Matter of Emmett*, 9 App. Div. 237, 150 N. Y. 538.

An application for an order under § 65 of the Election Law overruling the decision of the officer with whom the certificate of nomination of candidates is filed as to the validity thereof, is a special proceeding, as defined by the Code. An appeal may be taken from an order affirming or overruling the determination of such an officer when the appeal can be heard and determined in due season. *Matter of Mitchell*, 81 Hun, 401.

An appeal to the appellate division in an election matter will not be dismissed where it involves a question of public interest simply because the time has passed when the rights of the parties to the appeal can be affected by its decision. *People ex rel. Spire v. General Committee*, 25 App. Div. 339, following *Matter of Cuddeback*, 3 App. Div. 103.

The writ of *certiorari* is a special proceeding and an order from which an appeal is taken therein affects a substantial right. It is, therefore, appealable under § 1356. *People ex rel. Thomas v. Sackett*, 15 App. Div. 290.

But an order in a special proceeding instituted before a justice of the peace is not appealable from the county court to the appellate division. Where an appeal is not authorized by statute the consent of the parties cannot confer authority upon the appellate division to hear the appeal. *Matter of Rafferty*, 14 App. Div. 55.

Since the word "final" was stricken from § 1356 of the Code by the amendment of 1877, the right to appeal in special proceedings is not limited to final orders. *Hart v. Johnson*, 43 Hun, 505.

An appeal lies from an order confirming the report of commissioners in proceedings relative to the opening of streets in the city of New York under special laws. *Matter of Kingsbridge Road*, 4 Hun, 245, affirmed in 62 N. Y. 645; *Matter of Commissioners of Central Park*, 4 Lans. 647; *King v. Mayor*, 36 N. Y. 182; *Pryor's Appeal*, 5 Abb. 572.

An order made by a special county judge upon return of a writ of *habeas corpus* discharging the relator from imprisonment under execution issued upon a justice's judgment can only be reviewed by appeal and not by *certiorari*. Section 1351 includes all such orders. *People ex rel. Tucker*, 16 Civ. Pro. 126, 7 Supp. 192.

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An order appointing commissioners in condemnation proceedings is appealable. *In re City of Utica*, 73 Hun, 256, 26 Supp. 564. *In re Broadway & 7th Ave. R. R. Co.*, 69 Hun, 275, 23 Supp. 609, an order appointing commissioners to determine points of crossing by the intersecting of railroad tracks of one railroad over another under the Railroad Act is appealable as from an order affecting a substantial right made in a special proceeding. Such right of appeal is not prohibited by the General Railroad Act. *In re Saratoga El. Co.*, 58 Hun, 288, 12 Supp. 318. An appeal lies from an order which is absolute in adjudging a person in contempt and prescribing punishment. *Boon v. McGucken*, 67 Hun, 251, 22 Supp. 424, 23 Civ. Proc. 115.

An order made at Special Term denying an order to show cause why a party should not be punished for contempt of mandamus is final and appealable. *People v. Rice*, 144 N. Y. 249, 74 Hun, 179. An appeal lies from an order of the county court determining the validity of the Election Law. *In re Village of Harrisville v. Lawrence*, 66 Hun, 302, 21 Supp. 62. An appeal lies from an order directing the county clerk to print certain names on the official ballot when made by a justice of the Supreme Court under § 65 of the Election Law, which provides that officers with whom certificates of nomination are filed shall pass on objections thereto and his decision shall be final, unless an order shall have been made in the matter by the court or a justice of the Supreme Court. *In re Mitchell*, 81 Hun, 401, 63 St. Rep. 121, 30 Supp. 962.

The statute authorizing the State Commission in Lunacy to make certain orders, and providing that "if such an order is issued it must be approved by a justice of the Supreme Court," does not make the order of the commission the order of the court, and therefore a refusal of the judge to revoke his approval is not appealable. *Matter of Board of Charities*, 76 Hun, 74, 27 Supp. 856. An order appointing a receiver in proceedings supplementary to execution is not appealable. *Moschell v. Boor*, 66 Hun, 557, 21 Supp. 683. On a motion by a candidate, for mandamus to the Board of Canvassers to adopt a certain statement of canvass of votes, the opposing candidate moved for permission to appear and be heard, which was granted, but subsequently a further order stating that he appeared and was made a party was refused; *held*, that he could not appeal from the

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order, granting the writ. *People v. Bd. of Canvassers*, 50 Hun, 601, 2 Supp. 561.

Undertaking for staying execution upon appeal in special proceedings must be in the form prescribed by § 1327, for staying an appeal from an order directing the payment of a sum of money, as the provisions of this section are rendered applicable to a stay of proceedings on appeal in special proceedings by §§ 1351-1360. *In re Ciancimino*, 26 Abb. N. C. 48, 13 Supp. 856. Judgment affirmed, 59 Hun, 622, 14 Supp. 938. An order appointing commissioners to assess damages in proceedings for extending a street is a special proceeding within § 3240, providing that costs on appeal in special proceedings taken to a court of record may be awarded to a party in the discretion of the court at rates allowed for similar services in actions. *Matter of South Market Street*, 80 Hun, 246, 29 Supp. 1030. Proceedings to vacate an assessment are special proceedings which abate on the death of the petitioner, and cannot be revived in the name of their administrators or executors. *In re Barney*, 53 Hun, 480, 6 Supp. 401; *In re Marshall*, 55 Hun, 606, 7 Supp. 861; *In re Roberts*, 53 Hun, 338, 6 Supp. 195. (See amendment to § 755 made in 1891.)

A like rule was held in *Matter of Palmer*, 115 N. Y. 493, previous to the amendment of 1891. The right to revive and continue undetermined special proceedings in the name of or against the administrator of a deceased party depends entirely upon statutory authority.

Application of §§ 755-757 of the Code is limited to subdivisions 6 and 4 of § 3347, and they do not relate to proceedings in surrogates' courts, notwithstanding the amendment of that section in 1891. *Matter of Camp*, 81 Hun, 387.

Section 1356 regulates appeals in special proceedings (*Dickerman v. Dickerman*, 34 Hun, 585), including appeals from references of disputed claims by order of the surrogate. *De Nise v. De Nise*, 41 Hun, 9. Also proceedings to punish as for a contempt which are appealable to the Court of Appeals. *People ex rel. Negus v. Dwyer*, 90 N. Y. 402. An appeal from an order confirming the report of arbitrators and from the judgment entered thereon must be heard upon the same papers as were before the court at the time when the order was made and the judgment directed from which the appeal was taken. A case

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forms no part of the papers, and none can regularly be proposed or served in any proceeding taken to make or review an application concerning an award. The proceeding prescribed by the Code for vacating or modifying or correcting an award is a motion, and the papers on which it is founded must accompany the notice of motion, and from the order made thereon an appeal may be taken and heard on the same papers upon which appeals from orders are heard in other cases. *Matter of Poole v. Johnson*, 32 Hun, 216. Such an order can only be reviewed on appeal. *Matter of Livingston*, 32 How. 20, 34 N. Y. 555. When, in special proceedings in courts, or before officers of limited jurisdiction, they are required to ascertain a particular fact in such proceedings, having particular qualifications, or occupying some peculiar relations to the parties or subject-matter, such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose, and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. *Porter v. Purdy*, 29 N. Y. 106.

It seems that the distinction between proceedings instituted at Special Term and those instituted at chambers is disregarded in the Code of Civil Procedure by this and the succeeding section. *Matter of Jetter*, 78 N. Y. 601. That an intermediate order can be brought up for review; see *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190.

An order of a county judge directing a further assessment to be made in proceedings instituted for the drainage of swamps, as provided by chapter 608 of Laws of 1881, is final and conclusive, and no appeal lies therefrom to the General Term, either on questions of law or fact. *Matter of Swan*, 33 Hun, 200. But an order made by a county judge upon an application for the refunding of a tax illegally or improperly assessed, or levied, is an order made in a special proceeding, and as such reviewable upon appeal to the General Term under this section. *Matter of Harris v. Supervisors of Niagara*, 33 Hun, 279. This section has no longer any application to bastardy proceedings since the Code of Criminal Procedure, and they must be reviewed by *certiorari* as thereby provided. *People v. Carney*, 29 Hun, 47. If respondents in a surrogate's court desire a review, they should secure a return by the surrogate of all

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the facts and evidence upon which the claim was allowed. So held under old Code. *Hannahs v. Hannahs*, 5 Hun, 644. It was said in *Matter of Kings Bridge Road*, 5 Hun, 146, that an appeal from an order of the Special Term, confirming the report of commissioners of estimate and assessment, brings up for review only those questions which were discussed below. See, also, *Haviland v. White*, 7 How. 154. But in *Matter of Petition of Livingston*, 34 N. Y. 555, it is held, that on an appeal from an order in a special proceeding, it is in the power of the court to examine the whole proceeding, and the language of the section is in accordance with that decision.

The stay under § 1360 can only be by order, and if security is required, the provisions of title 2, chapter 12, apply. *Ryan v. Webb*, 39 Hun, 436. It was held before the present Code that the intention of the legislature was to assimilate appeals in special proceedings to those from judgments. *Rochester Water Works v. Wood*, 60 Barb. 137; *Matter of Anderson*, 60 N. Y. 457. An order made by a justice of the Supreme Court and affirmed by the appellate division determining as a result of a summary investigation into the financial affairs of a village, instituted by taxpayers and freeholders under the General Municipal Law, section 3, chapter 685, Laws 1892, is reviewable by the Court of Appeals as a final order in a special proceeding. *Matter of Taxpayers of Plattsburgh*, 157 N. Y. 78, reversing 27 App. Div. 353. In *Brinkley v. Brinkley*, 47 N. Y. 40, it is held that if the order is conditional and the punishment not inflicted, but it is in the power of the defendant to avert it, it is not a final order and so is not appealable. Where on a motion to punish for contempt in violating an injunction order there is evidence sufficient to call for the exercise of the discretion of the court, the decision is not reviewable by the Court of Appeals. *Mayor v. N. Y. & S. I. Ferry Co.*, 64 N. Y. 622. An order of the appellate division reversing an order of the Special Term vacating a final order or judgment in condemnation proceedings is not a final order in special proceedings within the meaning of the Constitution and § 190 of the Code, and so not appealable as of right to the Court of Appeals. *City of Johnstown v. Wade*, 157 N. Y. 50, dismissing 30 App. Div. 5.

An order of the appellate division affirming an order of the Special Term appointing commissioners to ascertain the damages

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to property owners by the reason of change of grade of a village street, although made in a special proceeding, is not a final order and therefore not appealable as a matter of right to the Court of Appeals. *Matter of Grab*, 157 N. Y. 69, dismissing appeal in 31 App. Div. 610. An order of the appellate division reversing an order of Special Term made on motion to determine whether a fund in question was covered by the lien of a mortgage being foreclosed, is not a final order in a special proceeding, but an order in a foreclosure action, and not appealable to the Court of Appeals as a matter of right. *New York Security & Trust Company v. Saratoga, G. & E. L. Co.*, 156 N. Y. 645, dismissing appeal in 30 App. Div. 89.

The provisions of § 190 of the Code of Civil Procedure allowing appeals to the Court of Appeals from an order finally determining actions and special proceedings refer only to final judgments in actions and final orders in special proceedings, and an appeal cannot be taken to the Court of Appeals from an order in an action although it is one which ends the litigation. *Van Arsdale v. King*, 155 N. Y. 325. A like rule was held in *Merri-man v. Parker L. Co.*, 155 N. Y. 136.

An order of the appellate division finally determining a proceeding by mandamus, under § 114 of the Election Law (L. 1896, ch. 909), for a recount of ballots, objected to as marked for identification, or rejected as void, and presenting a question of law for review, is appealable, as of right, to the Court of Appeals, as an order finally determining a special proceeding. *Peo. ex rel. Feeney v. Bd. of Canvassers*, 156 N. Y. 36. The Court of Appeals passed upon the appealability of an order claimed to be in a special proceeding. *Matter of Attorney-General*, 145 N. Y. 441.

For other authorities as to what special proceedings are appealable, see authorities collated under Art. I. of this chapter as to what are special proceedings; and also under Art. III. enumerating special proceedings.

CHAPTER II.

STATE WRITS.

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ARTICLE I.

STATE WRITS ENUMERATED AND DEFINED. § 1991.

§ 1991. State writs enumerated.

The writ of *habeas corpus* to bring up a person to testify, or to answer; the writ of *habeas corpus*, and the writ of *certiorari*, to inquire into the cause of detention; the writ of *mandamus*; the writ of prohibition; the writ of assessment of damages, which is substituted for the writ heretofore known as the writ of *ad quod damnum*; and the writ of *certiorari* to review the determination of an inferior tribunal, which may be called the writ of review, shall hereafter be styled, collectively, State writs.

The title of the writs enumerated in this chapter is new under the Code of Civil Procedure, but the writs are all of common-law origin. All these writs formerly ran in the king's name and

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now run in the name of the people under the title "State Writs," which was first applied in the proposed revision of the Code submitted by the Code Commission, of which David Dudley Field was the head, in 1853.

The section relative to this matter provided, "The writs heretofore known as prerogative writs so far as they are hereafter to be recognized, shall be denominated State Writs." That report provided for a change in the names of the various writs, by which writ of *certiorari* was to be known as the "Writ of Review of Inferior Jurisdiction"; the writ of *mandamus* it was provided should be thereafter denominated the "Writ of Mandate"; the writ of *ad quod damnum* was to be known as the "Writ of Assessment of Damages," and the writ of *habeas corpus* as the "Writ of Deliverance from Imprisonment." Every other writ of *habeas corpus* was abolished. The old names, however, were retained in the revision of 1880 except the writ "*ad quod damnum*," which became the "Writ of Assessment of Damages."

It must be observed that the scope of all these writs, with the possible exception of the writ of *habeas corpus*, has been very greatly modified from time to time by the custom and usage of the courts and by statutory enactment. The Code now defines their nature and limits the circumstances under which they may issue.

The object of retaining the writs as such in any of these proceedings is not at all clear, since every object sought to be accomplished by the writ can be and is brought about in all other proceedings by the granting and service of an order made by the court. As these writs can only issue by special order of the court, they simply create an unnecessary complication by reason of the requirement for their formal preparation and service, as they can only be based upon an order which would be in these cases, as in all others, quite sufficient of itself without the additional labor imposed by requiring the seal of the court, which certainly adds nothing to their authority or validity.

As they stand, however, as part of the practice they must be recognized and considered in any proceeding, of which they constitute one of the requisites, as being absolutely necessary to its enforcement.

The writ of *habeas corpus*, to bring up a person to testify or answer, serves a convenient purpose in practice, which is fully

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described in its title; its origin and history have no especial interest, and its use is much restricted.

The writ of *habeas corpus* and the ancillary writ of *certiorari*, which must not be confounded with the ordinary writ of review bearing that title, take a leading place in the history of the common law. The *habeas corpus* is one of the oldest of the common-law writs, traces of it being found as early as 1374. The writ of *habeas corpus* is an ancient and legal writ. Cro. Car. 466. In Bacon's Abridgment, vol. 3, p. 42, and Comyn's Digest, vol. 4, p. 336, the writ of *habeas corpus* is said to be awarded to have the body and cause of one imprisoned removed to some superior jurisdiction which hath the authority to examine the legality of the commitment. It went under various names, as the *habeas corpus ad subjiciendum*, which issued in criminal cases; the *habeas corpus ad faciendum and recipiendum*, which issued only in civil cases; the *habeas corpus ad respondendum*, where the person was confined in jail for a cause of action accruing in an inferior court, and a third person had a cause of action against him; and the *habeas corpus ad deliberandum and recipiendum*, which lay to remove the person to the proper place, or the county where he had committed some criminal offence.

The writ as it now exists dates back to the time of Charles II. One of the notable instances of its use was the case of John Wilkes, in 1763, he having been arrested for publishing a treasonable and seditious newspaper. The writ was sued out on the ground that no name was inserted in the warrant issued for his arrest.

The writ was issued in this State as early as 1787, on the ground that the commitment did not specify the offence charged.

The statute of Charles II. was followed in the first statute enacted in this State in 1787; this was amended in 1818, and again in 1828. The subsequent revisions have been slight, the Code of Civil Procedure having adopted substantially the previous statutes.

The Constitution of the United States provides (art. 1, § 9, clause 2): "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety requires it," thus recognizing the existence of the remedy; and in 1789, Congress passed an act defining the jurisdiction of the Federal courts in issuing the writ.

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The writ of *certiorari*, to inquire into the cause of the detention, is in aid of the writ of *habeas corpus*, and provided for by the same article of the Code of Civil Procedure.

The writ of mandamus seems originally to have been a mandate from the sovereign directing the performance of a specific act by a subject. By Comyn's Digest, vol. 5, p. 21, mandamus is defined as a prerogative writ introduced to prevent disorder from a failure of justice and defect of police, and ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one; while Bacon's Abridgment, vol. 4, p. 497, defines mandamus as a writ commanding execution of an act where otherwise justice would be obstructed or the king's charter neglected, issuing regularly in cases relating only to the public and the government, and is, therefore, termed a prerogative writ. It is defined by Blackstone as "In general a command issuing in the king's name from the Court of the King's Bench and directed to any person, corporation, or inferior court of jurisdiction within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office or duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right or justice."

Lord Mansfield said: "A mandamus is a prerogative writ to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. There is no doubt that where a party who has a right has no other specific legal remedy, the court will assist him by issuing this writ." *Rex v. Asken*, Burr. 486.

The Code of Civil Procedure has defined fully the practice on this writ, which theretofore was regulated partially by the common-law rules, partially by the Revised Statutes, and in part by the Code of Procedure. The writ of mandamus is a legal writ, and the forms of procedure and the rules which governed in the Court of Chancery have no application to it. *People, ex rel. v. French*, 3 Civ. Pro. 180.

Bacon's Abridgment, vol. 5, p. 446, says of the writ of prohibition, that its object is the preservation of the right of the king's crown and courts, and the ease and quiet of the subject; its object is to keep the several courts within the limits and bounds of their jurisdictions prescribed by the laws and statutes of the

 Art. I. State Writs Enumerated and Defined.

realm. The writ of prohibition, while but rarely used, was declared by Judge Selden in *Quimbo Appo v. The People*, 20 N. Y. 531, "an ancient and valuable writ, and one, the use of which in all proper cases should be upheld and encouraged." It was employed in England from the earliest times, being issued only from the King's Bench, and mainly ran to the ecclesiastical courts. It lies to inferior tribunals to restrain judicial but not ministerial acts. It has been materially modified by the Code, and the practice under it simplified and defined.

The writ of *ad quod damnum*, or assessment of damages, was a writ used to inquire whether a grant intended to be made by the king would be to the damage of him or others. Comyn, vol. 1, p. 398. There is in this State but a single reported case previous to the Code of Civil Procedure; by the Code the details of the practice were largely modified.

A *certiorari* is an original writ issuing out of Chancery or the King's Bench, directed in the king's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such justices as he shall assign to hear the cause. Bacon's Abridgment, title *Certiorari*.

The Courts of Chancery and King's Bench might award a *certiorari* to remove a proceeding from any inferior court, whether of an ancient or newly-created jurisdiction, unless the statute or charter which created them exempted them from such jurisdiction (Bacon's Abridgment, vol. 1, p. 561); or as said by Comyn (Digest, vol. 2, p. 185), the writ of *certiorari* was an original writ issuing out of Chancery or King's Bench, when the king would be certified of any record in any other court of record.

At common law this writ removed the proceeding to the court issuing the writ, which then took cognizance of the matter as an original proceeding, and heard and determined it as such. With us, however, it is a writ of review of the determination of an inferior board or tribunal. Its functions have been narrowed from time to time by provisions for review of determinations of the different courts by appeal, and by the Code of Civil Procedure it is only made applicable to cases where no appeal will lie.

The writ of *certiorari* to inquire into the cause of detention, and the writ of *certiorari* to review a determination of an in-

 Art. 2. Regulations as to State Writs.

ferior tribunal are separate and distinct writs. *People ex rel. Taylor v. Scaman*, 8 Misc. 153. See this case for the distinction between these two writs.

Though the writ of prohibition is retained among the State writs, by this section, it was said by the commissioners, that the writ had survived its practical utility, and that all the benefits of the writ may be obtained by means of injunction. The court says that the writ is confined to a narrow field of operation. *People ex rel. Baldwin v. Goldfogle*, 23 Civ. Pro. 419, 62 St. Rep. 70, 30 Supp. 296.

ARTICLE II.

REGULATIONS AS TO STATE WRITS. §§ 1993, 1994, 1992, 1996, 1995, 1998.

§ 1993. State writ at the instance of the people.

Where a State writ is required, in an action or special proceeding, civil or criminal, to which the people are a party, or in which they are interested, it may be awarded upon the application of the attorney-general, or of the district attorney having charge of the action or special proceeding; and the indorsement of the allowance thereof must state, that it was issued on such an application.

2 R. S. 574, § 77.

§ 1994. Relator, when joined with people; parties, how styled

A State writ must be issued in behalf of the people of the State; but where it is awarded upon the application of a private person, it must show that it was issued upon the relation of that person. The officer or other person, against whom the writ is issued, shall be styled the defendant therein.

§ 1992. To be under seal of court.

A State writ must be issued under the seal of the court by which it is awarded. Where it is allowed by a judge out of court, and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable. Where it is returnable before a judge out of court, or before a body or tribunal, other than a court of record, it must be issued under the seal of the Supreme Court. Where the seal of the Supreme Court is to be used, as prescribed in this section, it may be the seal of the county wherein the writ is awarded, or wherein it is returnable.

§ 1996. Allowance to be indorsed and signed.

The presiding judge of a court, by which a State writ is awarded, or the judge who allows such a writ out of court, as the case may be, must sign an allowance thereof indorsed thereupon, stating the date of the allowance.

§ 1995. Parties may appear by attorneys.

The parties to a special proceeding, instituted by State writ, may appear by

 Art. 2. Regulations as to State Writs.

attorney, with like effect as in an action brought in the Supreme Court ; but a return to such a writ must be made under the hand of the defendant, except in a case where it is otherwise specially prescribed by law, or where the court or judge, for good cause shown by affidavit, otherwise directs. Where the attorney-general or the district attorney does not appear for the people, the attorney for the relator is deemed also the attorney for the people.

§ 1998. When writ returnable.

Except where special provision is otherwise made in this act, a State writ may be made returnable forthwith, or on a future day certain, as the case requires.

Where the people have an interest the attorney-general is the proper officer to set it in effective operation on their behalf. So held on mandamus to compel railroad company to perform their duties as common carriers. *People v. N. Y. C. & H. R. R. R. Co.*, 28 Hun, 543.

The writ of mandamus on behalf of the people in their sovereign capacity can be awarded only upon the application of the attorney-general or some district attorney, and the indorsement upon the writ must show that it was issued upon such application, and in such case the name of no person need appear as relator in the proceeding. In other cases the proceeding is purely one to enforce a civil remedy and the people are present merely as a formal party, and their presence is due to the survival of a form which has long since ceased to have any significance or utility. The real party in interest is the relator in such a case, and if he should die the proceeding would abate. *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360, 373, 41 St. Rep. 918.

Section 1992 is a substantial re-enactment of 2 R. S. 574, § 74, except that certain writs are there enumerated by name. The writs and return thereto were required to be sealed under the earlier practice. See as to mandamus, 4 Bacon's Abridgment, 498; as to return to *certiorari* under seal of tribunal to which it is directed, 1 id. 571.

A writ of *certiorari* to review the determination of an inferior tribunal is a State writ, which by the express provision of the statute is required to be issued under the seal of the court before which it is returnable. A writ is not, however, void by reason of this defect, which may be cured by amendment. *People ex rel. v. Assessors of Town of Herkimer*, 6 Civ. Pro. 297.

 Art. 2. Regulations as to State Writs.

The provision of § 1992 is tantamount to the statute making the seal of the county the seal of the Supreme Court. In practice the writ will ordinarily issue from the Supreme Court, except in case of *habeas corpus*, where the writ is frequently allowed by county judges or other judicial officers having jurisdiction, but in those cases it is ordinarily returnable before the judge out of court.

The writ of mandamus is a State writ and should be issued in the name of the people of the State, but where it is awarded on the application of a private person it must show that it was awarded on the relation of that person. *People ex rel. Mason v. Board of Supervisors*, 45 Hun, 62.

When the writ is issued on behalf of the people, and on their application, the papers after the petition will be entitled "The People of the State of New York, against the person named as Defendant." On mandamus so entitled brought by the attorney-general, the affidavit was entitled in the proceeding. In case where a private person is relator, the title is "The People *ex rel.* Richard Stokes, against George Young, Sheriff;" the party suing out the writ is termed the relator.

It is said in *People v. Mason*, 9 Wend. 505, referring to 3 R. S. 77, which is similar in language, that the writ of *habeas corpus* is the proper remedy given the public prosecutor where property is burglariously stolen in one county and the offender is apprehended and committed for such offence to the jail of another county if he is indicted in the county where the property was stolen, and that the circumstances under which it is necessary or proper to issue the writ are not specified by the statute but are necessarily left in the discretion of the court. On production of a writ duly indorsed it is the duty of the sheriff to deliver the prisoner. The provisions as to the time of return to the writ of mandamus will be found at § 2072; those as to return to writ of *certiorari* at § 2132; those as to writ of prohibition at § 2095. The rule in King's Bench as to *certiorari* was that it was returnable the first day of the next term. Comyn's Digest, vol. 2, p. 192. The writ at common law must have been signed before sealing. 2 Salkeld, 434. By statute of Charles II. the writ of *habeas corpus* must be indorsed, and if not signed by the judge, need not be obeyed. Cowper, 672.

 Art. 3. Service of State Writs and Obedience Thereto.

The form of indorsement may be, under §§ 1993, 1995 :

“ The within writ allowed this 31st day of March, 1886.

(Signed) “ WILLIAM S. KENYON,
“ *County Judge.*”

Or

“ The within writ allowed this 31st day of March, 1886, on application of J. N. Vanderlyn, district attorney of Ulster county.

(Signed) “ WILLIAM S. KENYON,
“ *County Judge.*”

This indorsement, which is usually accompanied by a formal order that the writ issue, is the authority for signature of the clerk and affixing the seal.

ARTICLE III.

SERVICE OF STATE WRITS AND OBEDIENCE THERETO.

§§ 1999–2006.

§ 1999. How served.

Except where special provision is otherwise made in this act, a State writ must be personally served, in like manner as a summons, issued out of the Supreme Court; and each provision of this act, relating to the personal service of such a summons upon a defendant, applies to the service of a State writ.

§ 2000. Habeas corpus, how served; fees and undertaking, when required.

A writ of *habeas corpus* can be served only by an elector of the State. Where the prisoner is in custody of a sheriff, coroner, constable, or marshal, the service is not complete, unless the person serving the writ tenders to the officer, the fees allowed by law for bringing up the prisoner, and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect that the surety will pay the charges for carrying back the prisoner, if he shall be remanded; and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be, at least, twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be one thousand dollars.

2 R. S. 574, § 78, am'd.

§ 2001. Fees to persons not officers.

A court or a judge, allowing a writ of *habeas corpus*, directed to any person other than a sheriff, coroner, constable, or marshal, may, in its or his discretion, require the applicant, in order to render the service thereof complete, to pay the charges of bringing up the prisoner. In that case, the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.

§ 84.

§ 2002. Last two sections qualified.

The last two sections are not applicable to a case, where the writ is allowed upon the application of the attorney-general or a district attorney.

§ 79, am'd,

 Art. 3. Service of State Writs and Obedience Thereto.

§ 2003. Mode of serving writ, when person conceals himself, etc.

A writ of *habeas corpus* or of *certiorari*, issued as prescribed in article second or article third of this title, may be served by delivering it to the person to whom it is directed. If he cannot be found, with due diligence, it may be served by leaving it at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person upon whom the writ ought to be served keeps himself concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside, either of his dwelling-house, or of the place where the prisoner is confined. In that case, the service is complete, without tendering the fees or charges for bringing up the prisoner.

§§ 80 and 81, am'd.

§ 2004. Person served to obey habeas corpus.

A sheriff, coroner, constable, or marshal, upon whom complete service of a writ of *habeas corpus* is made, as prescribed in this article, must obey and make return to the writ, according to the exigencies thereof, whether it is directed to him or not. Any other person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it, according to the command thereof, without requiring any bond, or the payment of any charges, except such as are specified in the certificate allowing the writ.

§ 82.

§ 2005. Id.; as to certiorari.

A person, upon whom a writ of *certiorari*, issued as prescribed in this title, is served, must, in like manner, upon payment or tender of the fees allowed by law for making a return to the writ, and for copying the warrant, or other process or proceeding, to be annexed thereto, obey and return the writ, according to the exigency thereof.

§ 83.

§ 2006. Time of returning habeas corpus.

Where a writ of *habeas corpus* is returnable on a day certain, the return must be made at the time and place specified therein. Where such a writ is returnable forthwith, at a place within twenty miles of the place of service, the return must be made and the prisoner must be produced, within twenty-four hours after service; and the like time must be allowed for each additional twenty miles.

The service of writs as regulated by § 1999 must conform to § 426. A State writ may be served upon Saturday half holiday. *Peo. ex rel. Village of Fulton v. Suprs. of Oswego*, 15 Civ. Pro. 381.

By the statute of Charles II., if a *habeas corpus* was served on an officer having the custody of a person, he was bound, in three days after delivery, if within twenty miles, or in ten days if above twenty and under a hundred miles, or in twenty days if above a hundred miles, to return the writ and bring the body

 Art. 3. Service of State Writs and Obedience Thereto.

according to the command of the writ. Comyn's Digest, vol. 4, p. 331.

The form of indorsement given under § 1996 may be used under § 2001, adding, "and the charges for bringing up said prisoner, three dollars, are directed to be paid by the petitioner as a condition thereof."

Section 2003 relates entirely to the use of the writ of *habeas corpus*, and the writ of *certiorari* when used as an ancillary writ to inquire into the cause of detention, and is in aid of personal liberty as secured by *habeas corpus*.

Where relator was in sheriff's custody, the service of a writ of *habeas corpus*, directed to the sheriff and jail warden where relator was confined, on the warden only unless the sheriff could not be found, is insufficient, since the sheriff, having the legal custody of relator, was entitled to personal service under Code, § 1999, providing that such writs shall be personally served as a summons out of the Supreme Court, and § 2004, requiring the sheriff to make return to the writ when complete service is made upon him. *People ex rel. Mooney v. Walsh*, 1 Supp. 143, 15 Civ. Pro. 19, 21 Abb. N. C. 302, note.

The board of supervisors is a "person" within § 2005, requiring a person upon whom a writ of *certiorari* is served to make a return upon payment or tender of the legal fees, and is entitled to a fee for making such return. *People ex rel. Sutliff v. Board Supervisors of Fulton Co.*, 64 Hun, 375, 19 Supp. 773, 46 St. Rep. 471. The tender or payment of fees for copies of papers required to be returned, is a condition precedent which must be complied with before a person or a public body or an officer can be compelled by mandamus to make return to a writ of *certiorari*. *People ex rel. Dreicer v. Ouderkirk*, 76 Hun, 119, 27 Supp. 821, 57 St. Rep. 376. A sheriff, having a prisoner in custody, to whom a writ of *certiorari* to inquire into the cause of detention is issued, simply returns the commitment, and not the evidence upon which the commitment was granted. *Pro. ex rel. Taylor v. Seaman*, 8 Misc. 153.

The following is a precedent for the undertaking required:

"WHEREAS a writ of *habeas corpus* has been issued by Hon. William S. Kenyon, county judge of Ulster county, by which George Young, sheriff of Ulster county, is commanded to have the body of Richard Stokes before him at his chambers, in the city of Kingston, in said county, on the 2d day of April, 1886, at 10 o'clock in the forenoon. to

 Art. 4. Final Order and its Enforcement.

do and receive what shall be then and there considered, concerning said Stokes : Now, therefore, I, Lewis B. Stevens, banker of the town of Wawarsing, in the county of Ulster, undertake in the sum of \$1,000 to pay to said George Young all charges of carrying such prisoner, if he shall be remanded, and that such prisoner shall not escape by the way either in going to, remaining at, or returning from the place to which he is to be taken. " LEWIS B. STEVENS. [L. s.] "

To which should be attached the usual justification and acknowledgment.

ARTICLE IV.

FINAL ORDER AND ITS ENFORCEMENT. §§ 1997 and 2007.

§ 1997. Final order; certain proceedings same as in actions.

The final determination of the rights of the parties to a special proceeding instituted by State writ, is styled a final order. The provisions of this act, relating to amendments, motions, and intermediate orders, in an action, are applicable to similar acts in such a special proceeding; except where special provision is otherwise made therein, or where the proceeding is repugnant to the object of the State writ, or the mode of procedure thereunder.

§ 85.

§ 2007. Punishment for non-payment of costs.

For non-payment, upon demand, of the costs awarded by a final order, made in a special proceeding instituted by State writ, except where a peremptory writ of mandamus is awarded, after the issuing of an alternative mandamus, the person required to pay the same may be punished for a contempt of the court awarding them, or of which the judge awarding them is a member, as if the final order was a final judgment of the court.

The proceedings to punish a contempt of the court, other than a criminal contempt, are given under title 3, chapter 17, Code of Civil Procedure (see which title). Where a judgment of a court-martial is brought into Supreme Court by a writ of *certiorari*, and there reversed, the respondent is personally liable for the costs awarded by the final order and may be adjudged guilty of a contempt if he failed to pay them after a demand therefor has been made. *In re Leary*, 30 Hun, 394. Where a person is required to pay costs under § 2007, he may be punished for a contempt of the court awarding the costs. This is directory merely and the court will inflict such punishment only when in its judgment it is proper to do so. In a statute making a failure to pay the costs of a proceeding punishable as a contempt, permissive expressions should not be construed as mandatory and requiring the infliction of the punish-

Art. 4. Final Order and its Enforcement.

ment. *People v. Masonic Guild and Mut. Benefit Association*, 22 Civ. Pro. 74, 18 Supp. 806.

Under the provisions of the Code, § 1997, the court has ample authority to grant amendments either to an alternative or peremptory writ of mandamus in furtherance of justice. A mandamus has sometimes been styled a mandatory execution to carry into effect the final order of the court, and if an execution be issued in any case for too large an amount or otherwise embracing too much, it cannot be questioned that it is in the discretion of the court to amend or vacate it entirely. *People ex rel. Hasbrouck v. Supervisors of Dutchess*, 135 N. Y. 522, 534; S. C. 48 St. Rep. 533. Though the power of amendment given by § 723 of the Code of Civil Procedure does not include special proceedings as a class, yet it does apply to part of § 1997, and special proceedings instituted by State writ. *Peo. ex rel. B. E. R. Co. v. Bd. of Assessors*, 10 App. 394; *People ex rel. Moller v. Marsh*, 21 App. Div. 88. This power of amendment is broad enough to include an amendment as to parties as well as amendments to the petition. *Peo. ex rel. Benedict v. Roe*, 25 App. 110.

CHAPTER III.

THE WRIT OF HABEAS CORPUS TO BRING UP A PERSON TO TESTIFY.

§§ 2008-2014. Laws 1847, chap. 460, §§ 150, 155.

SECTIONS OF THE CODE AND WHERE FOUND IN THIS CHAPTER.

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§ 2008. Habeas corpus to testify; when allowed by court or judge.

A court of record, other than a justice's court of a city, or a judge of such a court, or a justice of the Supreme Court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of *habeas corpus*, for the purpose of bringing before the court, a prisoner, detained in a jail or prison within the State, to testify as a witness in the action or special proceeding, in behalf of the applicant.

2 R. S. 559, § 1, am'd.

§ 2009. [Am'd, 1895.] Id.; when allowed by judge.

Such a writ may also be issued by a justice of the supreme court, upon the application of a party to the special proceeding, civil or criminal, pending before any officer or body, authorized to examine a witness therein. In a case specified in this section, the writ may also be issued by a county judge or a special county judge, residing within the county where the officer resides, before whom, or the court or other body sits, in or before which, the special proceeding is pending.

Id. § 3, am'd; L. 1895, ch. 946.

§ 2010. [Am'd, 1895.] Id.; in suit before justice of the peace, etc.

Such a writ may also be issued by a justice of the Supreme Court, upon the application of a party to an action, pending before a justice of the peace, or in a justice's court of a city, or a district court of the city of New York, to bring before the justice or court, to be examined as a witness, a prisoner confined in the jail of the county where the action is to be tried, or an adjoining county. In a case specified in this section, the writ may also be issued by a county judge, or a special county judge, residing within the county where the justice resides, or the court is located, or the prisoner is confined, as the case may be.

Id. § 4, am'd; L. 1895, ch. 946.

§ 2011. [Am'd, 1895.] The last three sections qualified.

A writ shall not be issued, by virtue of either of the last three sections, to bring up

 Art. I. Application ; How Made.

a prisoner sentenced to death. Nor shall it be issued to bring up a prisoner confined under any other sentence for a felony ; except where the application is made in behalf of the people to bring him up as a witness on the trial of an indictment, and then only by and in the discretion of a justice of the Supreme Court upon such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations, as the judge prescribes.

Substituted for 2 R. S. 559, part of § 1 ; L. 1895, ch. 946.

§ 2012. Application ; how made.

An application for a writ, made as prescribed in either of the foregoing sections of this article, must be verified by affidavit, and must state :

1. The title and nature of the action or special proceeding, in regard to which the testimony of the prisoner is desired ; and the court, or body in or before which, or the officer before whom, it is pending.

2. That the testimony of the prisoner is material and necessary to the applicant, on the trial of the action, or the hearing of the special proceeding, as he is advised by counsel and verily believes.

3. The place of confinement of the prisoner.

4. Whether the prisoner is or is not confined under a sentence for a felony.

But where the attorney-general or district attorney makes the application, he need not swear to the advice of counsel.

Id. § 2.

§ 2013. Certain prisoners to be remanded.

The return to a writ, issued as prescribed in this article, must state for what cause the prisoner is held ; and if it appears therefrom, that he is held by virtue of a mandate in a civil action or special proceeding, or by virtue of a commitment upon a criminal charge, he must, after having testified, be remanded, and again committed to the prison, from which he was taken.

Substituted for Id. § 5.

§ 2014. Officer to obey and return writ.

Any officer to whom a writ, issued as prescribed in this article, is delivered, must obey the same, according to the exigency thereof, and make a return thereto accordingly. If he refuses or neglects so to do, he forfeits to the people, if the writ was issued upon the application of the attorney-general or a district attorney, or, in any other case, to the party on whose application the writ was issued, the sum of five hundred dollars. But where the prisoner is confined under a sentence to death, a return to that effect is a sufficient obedience to the writ, without producing him.

The following are the provisions of §§ 150 and 155 of the Prison Law :

150. (Chap. 460, Laws 1847.) Convicts as Witnesses.

Whenever any convict confined in any county or State prison shall be considered an important witness in behalf of the people in this State upon any criminal prosecution against any other convict, or against any person indicted for a felony, by the district attorney prosecuting the same, it shall be the duty of any justice of the Supreme Court, in his discretion, upon the affidavit of such district attorney, to grant a *habeas corpus* for the purpose of bringing such person before the proper court to testify on such prosecution.

Art. 1. Writ to Produce Prisoners as Witnesses.

§ 155 (Chap. 460, Laws 1847.) Writ to Produce Prisoners as Witnesses.

Whenever it shall appear to the court in which an indictment is pending, and to be tried against any person for any offence committed by him while imprisoned in any county prison, or any one of the State prisons, or the person of any individual confined in such jail or State prison, that any other person confined in any county prison or in any of the State prisons, is an important witness in behalf of the person so indicted, such court is hereby authorized to grant a writ of *habeas corpus* for the purpose of bringing such prisoner before such court to testify upon the trial of such indictment, in behalf of the party making the application.

Sections 157 and 158 of chapter 460, Laws 1847, provide for the granting of a writ of *habeas corpus* for the purpose of bringing an individual indicted for any offence committed during imprisonment.

This writ is for the convenience of litigants in obtaining testimony of persons under arrest, and its functions are entirely different in their nature from those of the writ of *habeas corpus* to inquire into the cause of detention of a prisoner. It is in fact an order, granted *ex parte* upon certain proof, directing the sheriff, or other officer in whose custody the prisoner may be, to bring him into court to enable him to be examined as a witness.

The power of the court to issue a writ of *habeas corpus* to bring up a person to testify in a proceeding pending before it, did not come into existence by virtue of any statute of this State, but it was an original power inherent in the courts. It was exercised in England, and the Supreme Court has by statute and by provisions of the Constitution the same power in that regard that was exercised by the Court of King's Bench before 1776. *People v. Seabring*, 14 Misc. 33, 69 St. Rep. 614, 35 Supp. 237.

The prisoner may be brought up on writ to testify upon his own application for a discharge. *Wattles v. Marsh*, 5 Cow. 176. See *Martin v. Wood*, 7 Wend. 132.

It will be noticed § 2011 limits the application of § 2008.

It is very doubtful whether § 2011 ought to be construed as taking away the power of the court to issue the writ in a case which is not provided for in the preceding sections. Such a provision might very easily result in a serious denial of justice. *People v. Seabring*, 14 Misc. 33, 69 St. Rep. 614, 35 Supp. 237.

The form of writ given below is adapted from *Wattles v. Marsh*, 5 Cow. 176, and it is there held that a sheriff is protected by the

 Art. 1. Precedent for Petition and Writ.

writ if it was issued by an officer of competent jurisdiction, and is not void on its face, even if issued erroneously. There being no defect of jurisdiction in the officer, it is a justification to the sheriff. The writ issued in that case was held good despite irregularities which were not of a substantial character.

A like rule was held in *Wiles v. Brown*, 3 Barb. 37, where a sheriff was protected in obeying a discharge granted on *habeas corpus* by a Supreme Court commissioner, though it was an erroneous exercise of power.

Where a sheriff, having a prisoner in custody for contempt, receives a *habeas* to produce him to testify at an office in the place where the jail is situate, *held*, that he is not authorized to permit the prisoner to go to any other place than such office, or to remain with him there longer than the magistrate himself stayed, and that when the latter left his office for the night, it was the sheriff's duty to take his prisoner back to jail and return with him in the morning, if the officer required his attendance from day to day. *People v. Stone*, 10 Paige, 606. But he is not bound to keep the prisoner always in sight, and if the prisoner go about for a short time on his own business, it is not an escape. *Hassam v. Griffin*, 18 Johns. 48. Section 2014 cited is a re-enactment of § 20, 2 R. S. 562 (2 Edmunds, 582), with the addition of the last sentence providing for the case of a capital offence.

Precedent for Petition and Writ.

To the County Judge of Onondaga County :

The petition of Frederick Lasher respectfully shows that he is defendant in an action in the Supreme Court in the county of Onondaga, in which Charles Randall is plaintiff. That his testimony as a witness is material and necessary on the trial of said action, as he is advised by his counsel, John Wilkinson, and verily believes. That your petitioner is confined in the Onondaga county jail, under execution against his body in a civil action in which one Ambrose Wattles was plaintiff, and your petitioner defendant. Your petitioner further shows that the action in which said Randall is plaintiff is noticed for trial at a Circuit Court to be held at the court-house in the city of Syracuse, on the 20th day of April, 1897, and that this application is made in good faith to enable your petitioner to attend such trial as a witness.

Wherefore, your petitioner prays that a writ of *habeas corpus* to testify issue, commanding the sheriff of the county of Onondaga to have your petitioner before said Circuit Court on said 20th day of April, 1897,

Art. I. Precedent for Return by Sheriff.

and such other days to which said cause shall be adjourned to enable him to testify in said action. FREDERICK LASHER

(Add verification as to pleading.)

The People of the State of New York, ex rel. Frederick Lasher, to the Sheriff of the County of Onondaga, greeting :

We command you that you have the body of Frederick Lasher detained in the county jail of the county of Onondaga, before our Circuit Court at a term thereof to be held at the court-house in the city of Syracuse on the 20th day of April, 1897, at the opening of the court on that day and on such other days during said term to which the cause entitled Charles Randall against Frederick Lasher shall be adjourned, in your custody, under safe and secure conduct, to testify as a witness in said action.

And immediately after the said Frederick Lasher shall have testified in said action, that then you return him to the said county jail under safe conduct and have you then there this writ.

Witness, Hon. Joshua Forman, county judge of Onondaga
[L. s.] County, at the court-house in the city of Syracuse this 15th
day of April, 1897. A. BREEZE,

J. WILKINSON,

Clerk.

Attorney for Petitioner.

The writ should be indorsed "Granted this 15th day of April, 1897, J. Forman, county judge of Onondaga county," as provided by § 1996, and must also be accompanied on delivery to the sheriff by the bond provided for by § 2000.

Precedent for Return by Sheriff.

The return of Willard Marsh, sheriff of Onondaga County, to the writ of *habeas corpus* commanding him to bring up the body of Frederick Lasher to testify at a Circuit Court to be held at the court-house in Syracuse on the 20th day of April, 1897, shows: In obedience to said writ I certify that the said Frederick Lasher was heretofore committed to the county jail of said county, and is now held by virtue of an execution against his body in favor of one Ambrose Wattles.

All of which I hereto certify and have here the body of said Frederick Lasher, as by said writ commanded.

Dated April 20, 1897.

WILLARD MARSH,

Sheriff.

CHAPTER IV.

THE WRIT OF HABEAS CORPUS AND THE WRIT OF CERTIORARI TO INQUIRE INTO THE CAUSE OF DETENTION.*

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* This subject is treated in Hurd on Habeas Corpus, Church on Habeas Corpus, American and English Encyclopædia of Law, vol. 9, title Habeas Corpus, Spelling on Extraordinary Relief, Wood on Habeas Corpus, Mandamus, etc. Law Reports Annotated, vol. 1, page 373, vol. 4, page 236, vol. 10, page 616, vol. 11, page 614, contain notes relative to Habeas Corpus.

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ARTICLE I.

WHEN HABEAS CORPUS GRANTED. §§ 2066, 2015, 2016, 2044.
Dom. Rel. Law, §§ 40, 41. Code Criminal Procedure, § 827,
sub. 2.

SUB. I. NATURE AND PURPOSE OF THE WRIT. §§ 2066, 2015, 2044.

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4. WHEN WRIT GRANTED IN EXTRADITION CASES. Code Criminal Procedure, § 827, sub. 2.

 SUB. I. NATURE AND PURPOSE OF THE WRIT. §§ '2066, 2015, 2044.

§ 2066. Application of this article to other writs of habeas corpus.

Except as otherwise expressly prescribed by statute, the provisions of this article apply to and regulate the proceedings upon every common-law or statutory writ of habeas corpus, as far as they are applicable; and the authority of a court or a judge, to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to this article, in any case therein provided for.

§ 2015. Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.

A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretence, is entitled, except in one of the cases specified in the next section, to a writ of *habeas corpus* or a writ of *certiorari*, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of *habeas corpus* may be issued and served under this section, on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day.

§ 2044. When certiorari does not prevent habeas corpus.

Notwithstanding a writ of *certiorari* has been issued or returned, as prescribed in this article, the court or judge, before which or whom it is returnable, may issue a writ of *habeas corpus*, which is, in all respects, subject to the foregoing provisions of this article, relating to the latter writ. If the court or judge refuses a writ of *certiorari*, or, upon the return thereof, refuses to discharge the prisoner, the latter may claim, and is entitled to, the writ of *habeas corpus*, as prescribed in this article.

The writ of *habeas corpus* is directed to a person detaining another, and commands him to produce the body of the person detained at a certain time and place, with the time and cause of the detention, and to do, submit to, and receive whatsoever the court or judge awarding the writ shall determine in that behalf. It is a high prerogative writ, summary in its character, its object being to free from illegal restraint. It is not intended to re-try issues of fact or review the proceedings of a legal trial. *Ex parte Watkins*, 3 Pet. (U. S.) 201; *Wales v. Whitney*, 114 U. S. 571; *Church on Habeas Corpus*, § 177; *American & English Encyc. of Law*, vol. 9, p. 163; *Matter of Wright*, 29 Hun, 357, 65 How. 119.

It is a civil proceeding to enforce a civil right. *Ex parte Tom Tong*, 108 U. S. 556. Relief from illegal imprisonment by means

Art. I. When Habeas Corpus Granted.

of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before *Magna Charta*, and came to us as part of our inheritance from the mother country, and exists as part of the common law of the State. It is intended and well adapted to effect the great object secured in England by *Magna Charta*, and made part of our Constitution that no person shall be deprived of his liberty "without due process of law." This writ cannot be abrogated or its efficiency curtailed by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to this the greatest of all writs by an amendment of the organic law, be placed beyond its reach and remedial action. The privilege of the writ cannot even be temporarily suspended except for the safety of the State in cases of rebellion or invasion. The provisions of the Constitution relative thereto are transcripts of the former Constitution. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559. The writ cannot be used as a substitute for an appeal or writ of error. *Ex parte Yarborough*, 110 U. S. 651. Its purpose is not to review trials. *Matter of Moses*, 13 Abb. N. C. 189, 66 How 296; *Wales v. Whitney*, 114 U. S. 571. Nor is it properly used to try rights of guardianship. *People v. Mercein*, 8 Paige, 47; *People v. Wilcox*, 22 Barb. 186.

This article of the Code revises and codifies the practice on the writ of *habeas corpus*, but, as is said by the codifiers, makes few changes, for the reason that the original provisions of the Revised Statutes were modelled upon Livingston's Criminal Code for Louisiana, which has been regarded as a masterpiece of its kind, following closely as it does the Code Napoleon.

Habeas corpus is a common-law writ; its privilege is preserved by the organic law of the State of New York, and its legitimate purpose cannot be denied by statute. It is not available to inquire thereby into the mere legality or justice of a judgment or mandate, if the term "legality" or "justice" is not used so as to include questions of jurisdiction or power; but the want of jurisdiction of a tribunal to pronounce a judgment or mandate, by which a prisoner is placed and detained in custody, furnishes to him the right to resort to such writ for relief, and that is the subject of inquiry thereunder. If a party is held in custody only by virtue of a judgment pronounced when there is no jurisdic-

 Art. I. When Habeas Corpus Granted.

tion to pronounce the same, either on account of want of jurisdiction or by reason of its being in excess of jurisdiction, the judgment is void, and he is not put to an appeal therefrom, but may be released by *habeas corpus*. *People ex rel. Young v. Stout*, 81 Hun, 336, 63 St. Rep. 155, 30 Supp. 898, affirmed, 144 N. Y. 699, without opinion.

For the distinction between a writ of *certiorari* to inquire into the cause of detention, and the writ of *certiorari* to review a determination, see *Peo. ex rel. Taylor v. Seaman*, 8 Misc. 153.

Under § 2015, *habeas corpus* may be had to determine the right to the custody of an infant, and, in determining this subject, the jurisdiction of the court is equitable in its character. Where such writ is dismissed without prejudice to the renewal of the application, there is no final adjudication in the matter, and such dismissal will not be reviewed by the Court of Appeals. *Peo. ex rel. Pruyn v. Walts*, 122 N. Y. 241. See *Peo. ex rel. McLaughlin v. Wilson*, 88 Hun, 260, as to when a judge must remand the prisoner to custody upon a writ of *habeas corpus*. As from this section and others regulating *habeas corpus* to inquire into the cause of the detention, nothing must be allowed as a bar or impediment to the allowance of this writ; therefore security for costs cannot be required of a non-resident relator. *Peo. ex rel. James v. The Society for the Prevention of Cruelty to Children*, 19 Misc. 677. The granting of the writ of *habeas corpus* to review a sentence, the imprisonment under a valid requirement of which has not expired, is premature. *Peo. ex rel. Bedell v. Kinney*, 24 App. Div. 309, 48 Supp. 749, 82 St. Rep. 749. In the absence of proof as to the binding force of a determination in *habeas corpus* proceedings in the State in which it was made, it is conclusive in this State only upon an identical state of facts. *Peo. v. Dewey*, 23 Misc. 267, 50 Supp. 1013, 84 St. Rep. 1013.

Habeas corpus proceedings which are founded on a writ served on Sunday, in violation of the law of a foreign State in which they are brought, are void, and the defect in service cannot be waived by appearance. *People v. Dewey*, 23 Misc. 267, 50 Supp. 1013, 84 St. Rep. 1013. But see § 2015 Code Civ. Pro. as to issue and service of *habeas corpus* on Sunday in this State, where it is allowed.

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SUB. 2. WHEN WRIT GRANTED ON BEHALF OF PERSONS IMPRISONED.

§ 2016.

§ 2016. When neither writ shall be allowed.

A person is not entitled to either of the writs specified in the last section, in either of the following cases :

1. Where he has been committed, or is detained, by virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed, or is detained, by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction ; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt ; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

The leading case relative to the right to the writ of *habeas corpus* to relieve from imprisonment, is *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559. It is there held that the provisions of the *Habeas Corpus* Act, then part of the Revised Statutes (this decision having been before the Code of 1880), excluding from its benefit persons committed or detained by virtue of the judgment or decree of a competent tribunal, only applies where the tribunal has jurisdiction to render the judgment under some circumstances ; that the prohibition forbidding an inquiry upon return to the writ into the legality and justice of any process, judgment, decree, or execution, does not take from the court or officer having jurisdiction of the writ the power or relieve from the duty of determining whether the judgment or process emanated from the court of competent jurisdiction, and whether the court had the power to give the judgment or issue the process. There must be jurisdiction by the court to render the particular judgment, as well as jurisdiction of the prisoner and of the subject-matter ; and while the court or officer cannot upon return of the writ go behind the judgment and inquire into alleged errors and irregularities preceding it, the question is presented and must be determined whether upon the whole record the judgment was warranted by law and was within the jurisdiction of the court ; that the presumption in favor of the jurisdiction of a court of general jurisdiction is not conclusive, but may be rebutted ; and where the record shows the judgment is such as could not, under any circumstances or upon any state of facts, have been pronounced, the applicant is entitled to be discharged ; or if it is in excess of that which by law the court has power to make, it is void for

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the excess and can be so declared. This case reviews the history of the writ, discusses its importance and lays down the principles upon which it is granted, and has by the construction of the *Habeas Corpus* Act enlarged the scope of the writ and defined its application. Judge Allen says at page 591 of the opinion: "If the punishment for the offence is fixed by statute, a judgment in excess of the statutory limit is void for the excess as we have seen by the adjudged cases. A party held by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, is not put to his writ of error but may be released by *habeas corpus*." In *Woolf v. Jacobs*, 66 N. Y. 8, however, the Tweed case was distinguished, and it was held that in proceedings under the statute for contempt, the court had jurisdiction to determine the amount of costs and expenses to be imposed as a fine in case the party was adjudged in contempt, and if items were included which ought not to be allowed, it was not in excess of jurisdiction and did not render the commitment void, and the action could not be reviewed on *habeas corpus*. Referring to the Tweed case, it is said in the opinion of Rapallo, J., "How that decision can have been so misinterpreted, it is difficult to comprehend," and the opinion then states that what is decided in the Tweed case is "that where the punishment for a crime is defined and limited by statute, and the court has imposed a sentence to the full limit allowed by statute, it has exhausted its authority in the case, and that if it proceeds to impose further additional sentences, the latter are void and afford no justification for the detention of the prisoner after he has served out the full term of imprisonment which the statute empowered the court to impose upon him, and that he is then entitled to his discharge on *habeas corpus*."

The competency of the tribunal to render the judgment or decree under which a person is held in custody and its jurisdiction over him either as to matter, place, sum, or person is by the strictest implication made the subject of inquiry upon a hearing before a judge or court issuing a writ of *habeas corpus*, and the court is thereby expressly required upon the return of such a writ to institute an inquiry into the cause of detention and discharge the prisoner when there is a lack of jurisdiction on the part of the tribunal making an order for his detention. *People ex rel. Frey v. The Warden, etc.*, 100 N. Y. 20.

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In *People ex rel. Trainor v. Baker*, 89 N. Y. 460, it was held that where a sentence was excessive, the prisoner was not entitled to his discharge until the expiration of the sentence which the court had power to impose. In *People ex rel. Devoe v. Kelly*, 97 N. Y. 212, held, that where a person convicted of an offence was sentenced to imprisonment at hard labor, in State prison, the sentence being void and the conviction valid, the prisoner was not entitled to a discharge on *habeas corpus* and must be remanded to the custody of the sheriff; that the trial court might deal with him according to law.

When in proceedings by *habeas corpus*, it appears that the person is held in custody under a commitment issued by a magistrate, the only inquiry is whether the magistrate had jurisdiction of the case and authority to pronounce the judgment rendered for the cause assigned. The decision of the magistrate may not be reviewed, and so it is not essential to return the evidence upon the trial. If the process be valid on its face, the burden of impeaching its validity rests upon the prisoner. *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180, 40 St. Rep. 160, reversing 59 Hun 624 and 13 Supp. 401. In *People ex rel. Stokes v. Riscley*, 38 Hun, 280, the rule laid down in 89 N. Y. 460, 60 N. Y. 559, and as explained 66 N. Y. 10, is held and followed, the rule enunciated being: "Final judgment must be that of a competent tribunal to pronounce the judgment, and where competency to pronounce is exhausted or never existed it does not come within the definition of the final judgment as to which *habeas corpus* is ineffective." This case with others is cited, and followed in *People v. Carter*, 48 Hun, 165, 14 Civ. Pro. 241, 15 St. Rep. 640.

The Bill of Rights contains the following important provisions relative to the writ :

§ 10. Writ of habeas corpus not to be suspended.

The privilege of the writ of *habeas corpus* cannot be suspended, unless, when in case of rebellion or invasion, the public safety may require its suspension.

By Code, § 157, the sheriff or keeper of a jail is directed to obey a writ of *habeas corpus* relative to a prisoner committed to the jail upon process for contempt after conviction. Section 2282 regulates the proceedings by writ of *habeas corpus* where the prisoner has been committed for contempt.

Section 2 of chap. 357 of the Laws of 1873 provides for a writ

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of *habeas corpus* upon commitment by a police magistrate of a disorderly person.

Section 99 of the Penal Code provides that during a session of the Court of Oyer and Terminer in any county no prisoner detained in a county jail in such county upon a criminal charge shall be removed therefrom by a writ of *habeas corpus* unless such writ be issued by or is returnable before such court.

Section 464 of the Penal Code provides that a person arrested under the provisions relative to impure food may be discharged upon a writ of *habeas corpus* upon executing the bond required by law.

Section 15 of the Revised Statutes relative to the powers, duties, and obligations of trustees and assignees, contains provisions for a writ of *habeas corpus* where a person has been committed under the provisions of that title.

Under the Insanity Law, § 73, an insane person is entitled to the writ. The provisions are as follows:

§ 73. Habeas corpus.

Any one in custody as an insane person is entitled to a writ of *habeas corpus*, upon a proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and determined. The medical history of the patient, as it appears in the case book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn touching the mental condition of such person.

Section 2307 of the Code of Civil procedure relative to proceedings to discover the death of a tenant for life, provides that in proceedings for that purpose the writ of *habeas corpus* may be issued to bring up a person imprisoned within a State prison before any court or before a referee, as the case requires, except upon a sentence for a felony.

The decisions which follow show the right to the writ under the circumstances of the particular case.

A prisoner may be brought up on this writ and inquiry made into the jurisdiction of the committing magistrate or court passing sentence. *Devlin's Case*, 5 Abb. Pr. 281; *People v. Cassells*, 5 Hill, 164; *Catlin v. Neilson*, 16 Hun, 214; *People ex rel. Stokes v. Risely*, 38 id. 280; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559. Or that the court committing him was not legally constituted. *Matter of Devine*, 21 How. Pr. 80; *People v. Devine*, 5 Park. Cr. 42. If, upon the whole record, the judgment was not

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warranted by law the writ is available. The court will examine to see whether there was jurisdiction to render the particular judgment. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559. Where the process issued is not allowed by law the writ will issue. *Squire's Case*, 12 Abb. Pr. 38. The legality of arrest under civil process may thus be inquired into. *People v. Kelly*, 35 Barb. 444; *People v. Willet*, 6 Abb. Pr. 37; S. C. 15 How. 210. But see *Cable v. Cooper*, 15 Johns. 152; *Bank v. Jenkins*, 18 id. 305. The prisoner may have the writ before indictment to inquire whether the evidence was sufficient to hold him. *People v. Martin*, 1 Park. Cr. 187; *People v. Tompkins*, id. 224; *Ex parte Tayloc*, 5 Cow. 39; *People v. Stanley*, 18 How. 179. When a prisoner is improperly held by coroner the writ issues. *People v. Budge*, 4 Park. Cr. 519. But it will not issue to inquire as to sufficiency of indictment. *People v. McLeod*, 25 Wend. 483; S. C. 1 Hill, 377; *People v. Ruloff*, 5 Park. Cr. 77. It has been held that the correctness of a sentence as to the place of imprisonment cannot be thus inquired into. *People ex rel. Rice v. Keeper of Penitentiary*, 37 How. 494. Nor can the question be raised on *habeas* as to whether a former trial is a bar to an indictment. *People v. Ruloff*, 3 Park. Cr. 126. But the sufficiency of a commitment may be inquired into. Abbott's Dig., vol. 3, p. 566. Informality in a commitment for contempt is not available on *habeas corpus*. *People v. Nevins*, 1 Hill, 154; *Davidson's Case*, 13 Abb. Pr. 129; *People v. Goodhue*, 2 Johns. Ch. 198; *People ex rel. Kearny v. Kelly*, 22 How. Pr. 309; *Kahn's Case*, 11 Abb. 147; S. C. 19 How. 475. Only two questions can be inquired into in such case—jurisdiction and form of commitment. *People v. Sheriff of New York*, 29 Barb. 622. In case the alleged contempt is innocent or meritorious, the writ will lie, and it may be questioned collaterally on *habeas*. *People ex rel. Hackley v. Kelly*, 24 N. Y. 74. An order committing a party for a civil contempt, which fails to comply with the law that it shall adjudge that the misconduct complained of was calculated to, or did actually defeat, impair, impede, or prejudice the rights or remedies of a party, furnishes no foundation for imprisonment and is without jurisdiction. The party is entitled to be relieved from imprisonment on *habeas*. *Matter of Swenarton*, 40 Hun, 41. If confined as for a contempt for non-payment of money, see *People v. Cowles*, 4 Keyes, 38, distinguished, 69 N. Y. 544; *Matter of*

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Watson, 5 Lans. 466. Under § 50 of the former *Habeas Corpus* Act a pardon might be proven under the writ. *In re Edymoin*, 8 How. 478. The writ was held to lie to bring the prisoner from the jail in one county to another. *People v. Mason*, 9 Wend. 505. A person committed under the judgment of a competent tribunal cannot have the writ. *People ex rel. Phelps v. Oyer and Terminer of New York*, 14 Hun, 21. The constitutionality of an act under which a commitment was made cannot be inquired into. *Matter of Donohue*, 1 Abb. N. C. 1. Legality of judgment of a court-martial having jurisdiction cannot be inquired into. *Underhill v. Fullerton*, 10 Hun, 63. A prisoner not brought to trial may have *habeas corpus*, unless sufficient cause for detention is shown. *Estes v. Warden City Prison*, 11 Week. Dig. 271. The question of sanity of person confined in an insane asylum may be thus tried. *Matter of Dixon*, 11 Abb. N. C. 118. But this question should not be tried in this manner where there are pending proceedings before a jury. *Matter of Laurent*, 11 Abb. N. C. 120. Questions of fact cannot be retried. *Matter of Wright*, 29 Hun, 357; *Matter of Moses*, 13 Abb. N. C. 189; *Matter of Francesca*, 66 How. Pr. 178. A person confined under a commitment void on its face may have the writ. *People ex rel. Knowlton v. Sadler*, 2 N. Y. Cr. 438. If on proper facts court has jurisdiction, matters of fact cannot be reviewed on *habeas corpus*. *People ex rel. Martin v. Walters*, 15 Abb. N. C. 461; *People ex rel. Peterson v. Sisters of St Dominick*, 34 Hun, 463; *People v. Walters*, 7 Civ. Pro. 406.

The commitment of a female to a reformatory institution, by a police justice, in proceedings under the Laws of 1882, ch. 410, § 1466, as amended by Laws of 1886, ch. 353, is conclusive and cannot be reviewed upon *habeas corpus*. *Peo. ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 210.

Section 2016, which provides that one detained by virtue of an execution or other process, issued upon a judgment, decree, or final order, shall not be entitled to a writ of *habeas corpus*, refers to a valid and authorized execution, and therefore if the execution be without authority, although the judgment upon which it issued was good, the person arrested thereon may be released by *habeas corpus*. *Winnie v. Houghtaling*, 84 Hun, 169. Where, on a return to the writ of *habeas corpus*, it appears that if the prisoner is detained by virtue of a final judgment, and is under

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the exceptions of § 2016, the judge must remand him to custody. *People ex rel. McLaughlin v. Wilson*, 88 Hun, 261. The courts of special sessions have power to suspend sentence indefinitely, and impose sentence at the expiration of a limited time, but it seems that a prisoner may be discharged in *habeas corpus* proceedings where the sentence is void because the Recorder was *functus officio*. *Peo. ex rel. Dnnnigan v. Webster*, 14 Misc. 617. A traverse filed to a return in *habeas corpus*, alleging that the relator was not sworn and examined before a police magistrate, upon her commitment to a House of Mercy, is demurrable if it does not dispute the jurisdiction of the magistrate, nor allege facts showing a want of jurisdiction. *Peo. ex rel. Lazarus v. House of Mercy*, 23 App. Div. 383.

It has been said that the writ may issue even where the detention is by alleged authority of the United States. *People ex rel. v. Gaul*, 44 Barb. 98; *Matter of Sullivan*, 1 N. Y. Leg. Obs. 314; see *Matter of Barrett*, 42 Barb. 479; S. C. 25 How. 380. But under it, soldiers enlisted by the United States cannot be discharged. *Matter of O'Connor*, 48 Barb. 258; *Reilly's Case*, 2 Abb. (N. S.) 334; *Matter of Ferguson*, 9 Johns. 239. The rule as laid down in *Tarble's Case*, 13 Wall. 397, is that after a State judge issuing the writ is fully apprised by the return of the officer that the person is in custody of the United States, he can proceed no further; and this seems to be the now settled practice.

Error in the trial or judgment cannot be shown; expiration of term, reversal, or pardon may be. *People v. Cavanagh*, 2 Abb. 84; *Bennac v. People*, 4 Barb. 31; *People v. Cassells*, 5 Hill, 164. Nor can the regularity of the proceedings, nor the sufficiency of evidence, or accuracy of decisions, not affecting jurisdiction, be brought up on *habeas corpus*. *Baker's Case*, 11 How. 418; *People v. McCormick*, 4 Park. Cr. 9. Nor the legality of a judgment, where the court had jurisdiction or power to render it. *People v. Fullerton*, 10 Hun, 63. The only question is as to the jurisdiction to try the relator and make the commitment. *People v. Neilson*, 16 id. 214. The merits cannot be reviewed. *People v. Shea*, 3 Park. Cr. 562; *People v. Keeper of Penitentiary*, 37 How. 494; *Case of Twelve Commitments*, 19 Abb. 394. The writ cannot be used to try the title to any office. *Matter of Wakker*, 3 Barb. 162. The writ will issue when a prisoner is confined for contempt, leaving the question as to whether it is a criminal

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contempt to be determined on the hearing. This rule was adopted to settle questions arising from the decisions in *Watson's Case*, 3 Lans. 408; *People ex rel. v. Cowles*, 3 Abb. Ct. App. Dec. 507, 4 Keyes, 38; *People ex rel. v. Hackley*, 24 N. Y. 74. Where a sentence is void, a person may be discharged notwithstanding the apparent exception by § 2016, since the Constitution gives the remedy by *habeas corpus* in cases of illegal detention and the legislature cannot narrow its scope. *People ex rel. Dunnigan v. Webster*, 14 Misc. 617, citing *Tweed Case*, 60 N. Y. 559. A person arrested under a judgment obtained without jurisdiction or under a process not authorized by the judgment or by statute, may be released by a writ of *habeas corpus*. Section 2016, which provides that a person detained by virtue of an execution or other process issued upon a judgment shall not be entitled to the writ of *habeas corpus*, refers to a valid and authorized and not to a void execution. *Winne v. Hotaling*, 84 Hun, 166, 32 Supp. 450, 65 St. Rep. 736.

A commitment properly issued has, in *habeas corpus* cases, all the force and effect given to a final judgment of a court of competent jurisdiction under the provisions of § 2016. *People ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 207, 44 St. Rep. 677.

Where a relator is committed to prison in a proceeding not authorized by law, the court or judge before whom the prisoner is brought under a writ of *habeas corpus* must make a final order discharging him from imprisonment. *People ex rel. Fries v. Riley*, 25 Hun, 587.

Where no legal foundation is present upon which a person could be adjudged to be in contempt and directed to be imprisoned for refusal to pay a sum of money, the decision is held unauthorized and beyond the jurisdiction of the court and *habeas corpus* will lie. *In re Hess*, 1 Supp. 813, 48 Hun, 590, 16 St. Rep. 255. The test of a prisoner's right to relief by *habeas corpus* is not whether the court or magistrate had jurisdiction of the subject-matter for which the judgment was rendered and of the person of the party against whom it was rendered, but whether the tribunal was competent by reason of its civil or criminal jurisdiction to render the judgment by virtue of which the imprisonment is inflicted. *People ex rel. Martin v. Walters*, 15 Abb. N. C. 461. *Habeas corpus* will lie where there was no power in the court to render the judgment which was pronounced, and where the

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certificate of conviction, by virtue of which one was imprisoned, is no warrant for his detention. *People ex rel. Johnson v. Webster*, 92 Hun, 378. Every officer having power to grant a writ of *habeas corpus* has and may exercise in the forms prescribed by law all the powers exercised at common law by the King's Bench in England and the Supreme Court of this State, and it has always been held that upon *habeas corpus* the judge might go beyond the warrant and return of a committing magistrate in an inquiry as to the validity of the process. *People ex rel. Pickard v. Sheriff*, 11 Civ. Pro. 173, citing *People ex rel. Tweed v. Liscomb*, 60 N. Y. 567.

Upon *habeas corpus* the court cannot inquire into the legality or justice of a delinquency court organized under the Military Code for an error in the exercise of its jurisdiction. The remedy is by *certiorari* or appeal, and where neither the petition nor answer to the return denied the existence or the organization of the court, although it was one of limited jurisdiction, its jurisdiction cannot be attacked. *People ex rel. Patterson v. Reed*, 64 Hun, 453, 46 St. Rep. 597, 19 Supp. 878. The Supreme Court has no power to stay proceedings upon a final order discharging a prisoner in *habeas corpus* proceedings pending an appeal from such order. *People ex rel. Young v. Stout*, 10 Misc. 247, 63 St. Rep. 863, 31 Supp. 421. A court or judge upon the return of a writ of *habeas corpus* may not inquire into the legality or justice of any mandate, judgment, decree, or final order. *People ex rel. Gunn v. Webster*, 75 Hun, 278, 58 St. Rep. 225.

The provision of § 2034, that a court or judge shall not upon the return of a writ inquire into the legality or justice of any mandate, judgment, decree, or final order, applies only to courts of record. *People ex rel. Laird v. Hannah*, 92 Hun, 376. A commitment for breach of the peace in threatening to commit a crime which does not state that an undertaking was required by the magistrate, and that it was not given, and which does not specify the amount of bail, is void, and furnishes no authority to the sheriff to detain such person. *People ex rel. Day v. Reese*, 24 Misc. 528, 53 Supp. 965, 87 St. R. 965.

SUB. 3. WHEN WRIT GRANTED TO DETERMINE CUSTODY OF CHILD.

Dom. Rel. Law, §§ 40, 41.

§ 40. Habeas corpus for child detained by parents.

A husband or wife, being an inhabitant of this State, living in a state of separa-

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tion, without being divorced, who has a minor child, may apply to the Supreme Court for a writ of *habeas corpus* to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.

41. Habeas corpus for child detained by Shakers.

If it shall appear on such application or the return of the writ, that the husband or wife of the applicant has become attached to the society of Shakers, and detains a child of the marriage among them, and that such child is secreted or concealed among them, the court may issue a warrant in aid of such writ of *habeas corpus*, directed to the sheriff of the county where the child is suspected to be, commanding such sheriff, in the daytime, to search the dwelling-houses and other buildings of such society, or of any members thereof, or any other building specified in the warrant, for such child, and to bring him before the court, and the sheriff must forthwith execute such warrant.

It is laid down by Hurd, in his treatise on *Habeas Corpus*, that in exercising the jurisdiction in *habeas corpus* the following principles deduced from the cases are of general application.

"*First.* The court is in no case bound to deliver the child into the custody of any claimant, or of any other person, but may leave it in such custody as the welfare of the child at the time appears to require.

"*Second.* In controversies between parents for the custody of their legitimate children, the right of the father is held to be paramount to that of the mother; but the welfare of the child, and not the technical legal right, is the criterion by which to determine to whom the custody of the child shall be awarded.

"*Third.* In controversies between parents for the custody of their illegitimate children, the right of the mother is paramount; but as in the last case, the welfare of the child and not the technical legal right determines the custody.

"*Fourth.* In all cases, if the child has arrived at the age of discretion, it will be permitted to elect in whose custody it will remain, provided its choice under the circumstances does not, in the opinion of the court, lead to an improper custody."

In proceeding by *habeas corpus* under § 2015 to determine the right to the custody of an infant, the court is bound to respect the rights of the parent or guardian, and these may not be overthrown by the mere wishes of the child. The jurisdiction, however, of the court is equitable in its character, the welfare of the child is the chief object to be attained, and must be the guide for the judgment of the court. It is competent, therefore, for the court, while recognizing the legal rights of a guardian to make a temporary disposition of the child, by delivering it to other control or custody, when, in the exercise of its discretion, it determines this to be for the best interests of the child. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238, 33 St. Rep. 231.

A proceeding by *habeas corpus* to determine the right to the

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custody of the child is a proceeding at common law and does not call for the exercise of the equitable powers of the court. It is summary in its nature, and denials of the allegations of the return made to the writ may be made in an informal manner by affidavits or even orally. *People ex rel. Keator v. Moss*, 6 App. Div. 414.

On *habeas corpus* by the grandfather of a child 2½ years old, it appeared the child's mother had died at the house of petitioner, but the child remained there about 1½ years, when the father obtained possession of her and immediately placed her in an asylum for destitute children; that the father had not married again and had no home to which he could take his daughter and no person who could take care of her; that petitioner was able to give the child such care as one of her years should have; *held*, the custody should be awarded to the petitioner. *In re Riemann*, 10 Supp. 516, 31 St. Rep. 13.

The common-law writ of *habeas corpus* was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint. It was not a proceeding calculated to try the right of parents and guardians to the custody of infant children. It was a frequent use, however, when children were detained from their parents and guardians on the ground that absence from legal custody was equivalent to illegal restraint and imprisonment. In the case of children of the age of discretion the object of the writ was usually accomplished by allowing the party restrained the exercise of his volition, but in the case of an infant of an age to be incapable of determining what was best for itself the court or officer made the determination for it, and, in so doing, the child's welfare was the chief end in view. *Rex v. Delavel*, 3 Burr, 1435; *In re Waldron*, 13 Johns. 418; *People ex rel. Barry v. Mercein*, 8 Paige, 47, 25 Wend 73; *People ex rel. Wilcox v. Wilcox*, 14 N. Y. 575; *People ex rel. Whele v. Weisenbach*, 60 N. Y. 385; Hurd on Habeas Corpus, chap. 9. The purpose of the writ as now regulated by the Code is the same. Code Civ. Pro. 2015-2031.

On a petition by the father for a writ to obtain the custody of his minor child from her grandmother, it appeared respondent had reared the child from infancy in a home of wealth and refinement, and that the child, about seven years of age, was devoted to her grandmother and desired to remain with her;

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petitioner had no means and no home, and intended to have the child live with his father and stepmother; he had failed to support his wife during her life and did not attempt to get the custody of the child until after her death, *held*, that the interests of the child required she should be left with the respondent. *Paddock v. Egar*, 57 Hun, 591, 10 Supp. 710, affirmed, 128 N. Y. 616.

On a writ for the custody of a child six years old, where neither party had any legal claim to such custody, but the child had lived with respondents since it was one year old and they were much attached to her and she to them, and her mother before her death had expressed the wish defendant should have the child, the petitioners being the aunt and uncle having several children of their own and living in another State, it was held that the child should remain with respondents. *In re Lundergan*, 8 Supp. 924, 30 St. Rep. 382. The provisions of the Revised Statutes (2 R. S. 148, §§ 1 and 2), which provide that where the parents have separated, the mother may have *habeas corpus* for minor children and that the court may award her custody of them, are only permissive and do not give an absolute right to either parent. *Matter of Reynolds*, 8 Supp. 172, 28 St. Rep. 538. A child will not be taken from the custody of its father and given to its mother where it does not appear that its welfare requires the change. *Day v. Day*, 4 Misc. 235, 24 Supp. 873. In *People v. Trafford*, 12 Supp. 43, the rule was reiterated that the welfare of the children is the controlling consideration, and in that case her custody was awarded to her grandparents in a case where the husband and wife had separated.

In *People ex rel. Slatzkata v. Baker*, 3 Supp. 536, the provisions of chapter 364, Laws of 1864, to create a society for the protection of destitute Roman Catholic children and provide for the commitment of such children, is considered, the act prescribing a form for the commitment. Provisions of § 291 of the Penal Code relative to commitment of children under the age of sixteen years are considered. *In re Diss Debar*, 3 Supp. 667.

A *habeas corpus* decree of another State for the custody of a child is not conclusive in this State upon the interests of the child, as it was not a party to the proceeding. *People v. Dewey*, 23 Misc. 267, 50 Supp. 1013, 84 St. Rep. 1013. It is said in *Matter of Teese*, 32 App. Div. 46, that the testimony in cases of this character should ordinarily be taken before the

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judges themselves to save expenses to the parties, and because the judge who ultimately has to pass upon the question of the proper custody of the children with reference to their interests and welfare can do so much more intelligently where he has seen and heard the witness than where he has merely read the minutes of the stenographer. Where a husband abandons his wife and she obtains a divorce on that ground which makes no provision as to the child, the wife has a right to establish a domicile for herself and child, and where she does so, the court of a foreign state in which they are transiently sojourning has no power to regulate the relations between them on *habeas corpus*. *People v. Dewey*, 23 Misc. 267, 50 Supp. 1013, 84 St. Rep. 1013.

Laws of 1884, chapter 438, § 12, providing for an application to the surrogate's court for the rescission of an agreement of adoption, does not deprive the Supreme Court of jurisdiction to take the child from its adoptive parents under *habeas corpus* on proper showing. *People v. Paschal*, 68 Hun, 344, 22 Supp. 881.

Section 241 of the Code, conferring upon a county judge within his county the power conferred by law on an officer authorized to perform the duties of a justice of the Supreme Court at chambers or out of court, does not include jurisdiction of the care, custody, and control of infants. *People ex rel. Williams v. Corey*, 46 Hun, 408, followed in *People ex rel. Parr v. Parr*, 49 Hun, 473, which was affirmed 121 N. Y. 679.

A guardian may have the writ to bring up the person of his ward. *Hurd on Habeas Corpus*, 554. Where there is an adjudication that petitioner is not, and respondent is, entitled to the custody of an infant, it is a bar to a subsequent *habeas*; otherwise if the petition is dismissed. *Matter of Price*, 12 Hun, 508. But that a former *habeas* is not *res adjudicata* when the questions raised are different, or even upon the same facts, is held in *People v. Fancher*, 1 Hun, 27; *People v. Brady*, 56 N. Y. 182. It is questioned in *People v. Gilmore*, 26 Hun, 1, whether a person lawfully having the custody of a child, and permitting it to be used contrary to the provisions of the act to prevent wrongs to children, can be regarded as illegally confining or restraining a child.

The writ may be applied for by a parent or guardian to obtain control of children. *People v. Mercein*, 8 Paige, 47. See *Mercein v. Barry*, 25 Wend. 65; *People v. Mercein*, 3 Hill, 399;

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People v. Wilcox, 22 Barb. 178; *Wilcox v. Wilcox*, 4 Kern. 575; see, also, *People v. Cooper*, 1 Duer, 725. The father is entitled to custody of the child as against the mother, unless circumstances exist making a different disposition proper, as the tender years of the infant. *People v. Mercein*, 8 Paige, 47; *People v. Chegaray*, 18 Wend. 637; *People v. Nickerson*, 19 id. 16; *People v. Humphreys*, 24 Barb. 521; *People v. Olmstead*, 27 id. 9, 2 Kent's Com. 194; *People v. Mercein*, 3 Hill, 399. The fact of parents living apart may entitle the mother to custody of an infant. *Mercein v. Barry*, 25 Wend. 64; *People v. Mercein*, 8 Paige, 48. The husband may lose his right to the custody by immorality or inability to provide for its support, or the court may assign it to another when it is manifestly for the well-being of the child. Cases cited, *supra*; *Matter of Cuneen*, 17 How. 516; *Matter of Holmes*, 19 id. 329. The inclination of the infant may be consulted in a proper case. *Jones v. Erbert*, 17 Abb. 395; *People v. Kling*, 6 Barb. 366; *Matter of Waldron*, 13 Johns. 418; *People v. Wilcox*, 22 Barb. 178; *People v. Pillow*, 1 Sandf. 672; *Matter of McDowles*, 8 Johns. 329; *People v. Cooper*, 8 How. 288. The father of a bastard has no right to its control; its mother is entitled to its custody in case she is a proper person. *People v. Kling*, 6 Barb. 366; *Robalina v. Armstrong*, 15 id. 247; *Matter of Doyle*, Clarke's Ch. 157; *Jones v. Erbert*, 17 Abb. 397. It is provided by 2 R. S. 148, § 1, that where parents live separately the mother may apply for the writ to the Supreme Court. *People v. Manley*, 2 How. 61; *People v. Chegaray*, 18 Wend. 637; *People v. Mercien*, 8 Paige, 48; *People v. Nickerson*, 19 Wend. 18. In such case the petition should be presented to the court and the writ should be issued by the court. A judge at chambers cannot issue it. *People ex rel. v. Osborne*, 6 Civ. Pro. 299. Any one may ordinarily appear and litigate for the child. *People v. McLeod*, 3 Hill, 654, note. Where the return to a writ of *habeas corpus*, procured by a husband for the purpose of obtaining from his wife the custody of their infant child, alleges that the child is living in New Jersey and is not a resident of New York, and no traverse is interposed to such allegation, the mother of the child cannot be adjudged guilty of contempt, for a failure to produce the child as demanded by the writ. *Peo. ex rel. Winston v. Winston*, 51 App. Div. 121, 52 Supp. 814, 86 St. Rep. 814.

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SUB. 4. WHEN WRIT GRANTED IN EXTRADITION CASES. Code Criminal Procedure, § 827, sub. 2.

SUB. 2. Before any officer to whom such a warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the Governor of this State, such officer must unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the Supreme Court, or a county judge, who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit, or warrant annexed thereto, or in the warrant issued by the Governor thereon, he or they may have a writ of *habeas corpus* upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said court or judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the Governor and one of the judges aforesaid or a counsellor-at-law of this State, and such waiver shall be immediately forwarded to the Governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against, and mentioned in the requisition, the accompanying papers and the warrant issued by the Governor thereon, then the court or judge shall order and direct the officer intrusted with the execution of said warrant of the Governor to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrants issued thereon, as the agent or agents upon the part of such State to receive him or them, otherwise to be discharged from custody by the court or judge. If upon such hearing the warrant of the Governor shall appear to be defective or improperly executed, it shall be by the court or judge returned to the Governor, together with a statement of the defect or defects, for the purpose of being corrected and returned to the court or judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

In the absence of papers on which the warrant was granted the warrant alone can be considered, and recitals in the warrant are sufficient to sustain its validity. A mistake in the spelling of defendant's name is no ground for a discharge where the pronunciation remains the same and it is apparent that the defendant was the person intended. *Matter of Scrafford*, 36 St. Rep. 748, 59 Hun, 323, 12 Supp. 945.

One in the custody of a sheriff by virtue of a warrant of extradition issued by the Governor, directing him to deliver such persons to a designated agent making the deposition, is not a person detained in the common jail for a criminal charge, so as to authorize the writ of *habeas corpus*. It seems that when an officer of this State, having authority to do so, issues a writ, in such case the warrant of the Governor is not conclusive, and it

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is his duty, upon a return, to examine the affidavits presented to the Governor and determine whether any crime was properly or sufficiently charged against the prisoner. *People ex rel. Connors v. Reilly*, 11 Hun, 89. In *People ex rel. Draper v. Pinkerton*, 77 N. Y. 245, it was held that the recitals in a warrant of the Governor for the arrest of a fugitive from justice of another State are at least *prima facie* true. As to whether it is conclusive or may be met by evidence on the part of the prisoner showing the papers presented to the Governor were defective, is questioned. It was further held that a return to a writ, setting forth such a warrant, which contains recitals of facts necessary to confer authority under the Constitution and Laws of the United States to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the Governor acted.

In *People ex rel. Jourdan v. Donahue*, 84 N. Y. 438, it was held that where the papers upon which a warrant of extradition is issued, are withheld by the Executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires.

In *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, it is held that the courts have jurisdiction to interfere by writ of *habeas corpus* and to examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another State was issued, and in case the papers are defective and insufficient, to discharge the prisoner. The rule is well settled that the court has no right upon a question of extradition to consider the charge upon its merits or to undertake in any way whatsoever to determine whether it is well founded or not. *Matter of Clark*, 9 Wend. 212, cited, *People ex rel. Ryan v. Conlin*, 15 Misc. 303, 36 Supp. 888, 72 St. Rep. 110. In the latter case Justice Beckman lays down the law applicable to such cases as follows: "1. Where the papers upon which the Governor acted in issuing his warrant are before the court, it must appear therefrom that the prisoner is duly charged with the commission of a crime in the demanding State. 2. It must also appear upon the face of the papers, either by affirmative allegation or by necessary inference from the nature of the offence charged, that the prisoner was in the demanding State at the

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time when the offence charged against him was committed, for it is under such circumstances only that he can be held to be a fugitive from justice. 3. The prisoner must also be identified as the person against whom the charge was made, and for whose arrest the warrant of the Governor has been issued." See, also, *People ex rel. McCoy v. Warden of City Prison*, 3 N. Y. C. R. 370.

ARTICLE II.

WHAT COURT MAY GRANT WRIT AND APPLICATION THEREFOR.

§§ 2017, 2018, 2019, 2021, 2023.

§ 2017. [Am'd, 1895.] How and to whom application for habeas corpus or certiorari made.

Application for the writ must be made, by a written petition, signed, either by the person for whose relief it is intended, or by some person in his behalf, to either of the following courts or officers :

1. The Supreme Court, at a Special Term or the appellate division thereof, where the prisoner is detained within the judicial district within which the term is held.

2. A justice of the Supreme Court, in any part of the State.

3. An officer authorized to perform the duties of a justice of the Supreme Court at chambers, being or residing within the county, where the prisoner is detained; or, if there is no such officer within that city or county, capable of acting, or, if all those who are capable of acting and authorized to grant the writ, are absent, or have refused to grant it, then to an officer, authorized to perform those duties, residing in an adjoining county.

L. 1895, ch. 946.

§ 2018. Application in another county; proof required.

Where application for either writ is made as prescribed in subdivision third of the last section, without the county where the prisoner is detained, the officer must require proof, by the oath of the person applying, or by other sufficient evidence, of the facts which authorize him to act as therein prescribed; and if a judge in that county, authorized to grant the writ, is said to be incapable of acting, the cause of the incapacity must be specially set forth. If such proof is not produced, the application must be denied.

Id. § 24, am'd.

§ 2019. Contents of petition.

The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true; and must state, in substance :

1. That the person in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty; the place where, unless it is unknown, and the officer or person by whom he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

2. That he has not been committed, and is not detained by virtue of any judgment, decree, final order, or process, specified in § 2016 of this act.

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3. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition; unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

6. It must specify whether the petitioner applies for the writ of *habeas corpus*, or for the writ of *certiorari*.

2 R. S. 563, § 25.

§ 2021. [Am'd. 1895.] Form of writ of habeas corpus.

The writ of *habeas corpus*, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,

To the Sheriff of," etc. (or "to A. B.")

"We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before _____" ("the Supreme Court, at a Special Term or term of the appellate division thereof, to be held", or "E. F., justice of the Supreme Court", or otherwise, as the case may be) "at _____ on _____" [or "immediately after the receipt of this writ",] "to do and receive what shall then and there be considered, concerning the said C. D. And have you then there this writ.

"Witness, _____, one of the justices" (or "judges") "of the said court", (or "county judge", or otherwise, as the case may be,) "the _____ day of _____, in the year eighteen hundred and _____".

§ 2023. When writ returnable before another judge.

If application for either writ is made to the Supreme Court, or to a justice thereof in a county other than that where the person is imprisoned or confined, the writ may be made returnable, in its or his discretion, before any judge authorized to grant it, in the county of the imprisonment or confinement.

It is said that the power conferred on judges out of court, and judicial officers authorized to perform the duties of a judge, is obvious, and in this respect this writ differs from the writ of mandamus. *Pro. ex rel. Lower v. Donovan*, 29 Abb. N. C. 127, 135 N. Y. 81.

A petition by a wife living separate from her husband for a *habeas corpus* for the purpose of removing her minor child from the custody to which it had been committed by its father and to have it committed to her, should be presented to the court, and the writ should be issued by the court. A judge of chambers

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cannot issue it. The Revised Statutes gave the Supreme Court the right to issue the writ at the instance of a wife living separate from her husband, and thereupon to determine as to the custody of an infant child (2 R. S. § 12). The chancellor also, independent of the statute, might by *habeas corpus* cause an infant child to be brought before him and determine as to its custody, but since the repeal by chapter 417 of the Laws of 1877 by subdivision 21, § 16, of the Judiciary Act of 1847, justices of the Supreme Court, when not sitting as a court, have no power in such a proceeding. *People ex rel. Hoyle v. Osborn*, 6 Civ. Pro. 299.

Failure to state in a petition for a *habeas corpus*, that the person in whose behalf the writ is applied for is not detained by virtue of a final order of a competent tribunal, made in a special proceeding, or of an execution or transcript issued on such order, is a fatal defect. *People ex rel. Hoyle v. Osborn*, 6 Civ. Pro. 299.

Under § 99, chapter 686, Laws of 1892, a person imprisoned for contempt of the Court of Oyer and Terminer cannot be removed on *habeas corpus* returnable before a justice of the Supreme Court, though the Oyer and Terminer has taken a recess for several days. *Matter of Taylor*, 60 St. Rep. 136.

The petition must show the place of the detention of the prisoner or it is defective. It should also negative the fact of the detention by virtue of a judgment or decree. *People v. Cowles*, 59 How. 287.

Precedent for Petition by Prisoner. (38 Hun, 280.)

To Hon. WILLIAM S. KENYON, County Judge of Ulster County:

The petition of Richard Stokes respectfully shows, that he is now a prisoner confined in the custody of George Young, sheriff of Ulster County, at the county jail in said county, for supposed criminal offence.

Your petitioner further shows, that such confinement is by virtue of a commitment made by one F. D. L. Montanye, a justice of the peace of the town of Marbletown, a copy of which is hereto annexed, and to which reference is made for the grounds thereof.

And your petitioner further shows that, to his best knowledge and belief, he is not committed or detained by virtue of any process issued by any court of the United States or any judge thereof, or by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or final order of such court, or by virtue of any execution upon such judgment or decree.

Your petitioner further shows, that he is advised by his counsel, John F. Cloonan, of Kingston, N. Y., and verily believes that his imprison-

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ment is illegal, and that such illegality consists in this : That the commitment of said magistrate commits him to the county jail for the period of one year in default of payment of the fine of \$250 thereby imposed, and that it is void under § 718 of the Code of Criminal Procedure.

Wherefore your petitioner prays a writ of *habeas corpus* to the end that he may be bailed or discharged from custody.

Dated April 31, 1887.

RICHARD STOKES.

JOHN F. CLOONAN,

Attorney for Petitioner.

Precedent for Petition :—Under Void Commitment for Contempt. (143 N. Y. 219.)

To the Hon. WALTER LLOYD SMITH, one of the Justices of the Supreme Court of the State of New York :

This petition of Frederick L. Taylor respectfully shows :

That he is of the age of 20 years and resides in Plainfield, N. J., but he is at present a student in Cornell University, situate in the city of Ithaca, N. Y.

That he is now a prisoner confined in the custody of Charles S. Seaman, the sheriff of the county of Tompkins, in the State of New York, and has been imprisoned in said jail since March 22d, 1894.

And your petitioner further alleges to the best of his knowledge and belief that he is not detained by virtue of any mandate issued by a court or judge of the United States in a case where such courts or judges have exclusive jurisdiction by the commencement of legal proceedings in such a court ; nor by virtue of a final judgment or decree of any competent tribunal of civil or criminal jurisdiction by a final order of such a tribunal made in said proceedings instituted for any cause ; nor by virtue of an execution or other process issued on such a judgment, decree, or final order other than as stated hereinafter, wherein the reasons for your petitioner's imprisonment are set forth.

That the cause or pretence of your petitioner's imprisonment according to the best knowledge and belief of your petitioner is as follows :

That he was subpoenaed to appear as a witness before the grand jury now in session in the county of Tompkins to give evidence in an inquiry here pending to determine how and by what means and through whom one Henrietta Jackson came to her death in the city of Ithaca, N. Y., on the night of the 20th day of February, 1894.

That deponent was sworn as a witness before said grand jury and examined at great length and for a considerable time, and answered such questions as were asked of him until he was asked to answer certain questions the answers to which might tend to criminate him and connect him with the commission of said alleged crime, and which questions he refused to answer, giving as his reasons therefor to said grand jury that he refused and declined to answer said questions on the ground that his answers might tend to criminate him, and that he desired to put himself upon the privilege which the Constitution and the law of the State of

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New York gave him, and before said grand jury he claimed said privilege personal to himself, whereupon he was adjudged guilty of contempt by the court in the court-house in the city of Ithaca, N. Y., on the 22d day of March, 1894, at which court the Hon. Gerrit A. Forbes, one of the justices of the Supreme Court, was presiding, and a commitment was issued to the sheriff of the county of Tompkins against your petitioner, and by virtue of said commitment confined in the common jail of the county of Tompkins in the keeping of Charles S. Seaman, the sheriff of said county.

That a copy of said commitment is hereto annexed.

That your petitioner further shows that he was advised by his counsel, John B. Stanchfield, Esq., and verily believes, his imprisonment is illegal for the reasons above given, and because said grand jury for the reason above given have no jurisdiction to inquire into the matter as aforesaid.

Your petitioner further says that no prior or other application for a writ of *habeas corpus* to review said commitment has been made to any court or judge.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* may forthwith issue directed to Charles S. Seaman, sheriff of Tompkins county, commanding him, the said sheriff, forthwith to produce the body of your petitioner, Frederick L. Taylor, by him imprisoned and detained, together with the cause of such imprisonment and detention before a justice of the Supreme Court, so that the cause and detention of your petitioner may be inquired into to the end that he may be discharged from confinement.

Dated, March 23, 1894.

FREDERICK L. TAYLOR.

(*Add verification hereto.*)

Petition:—Under Void Commitment by Court Martial.

(100 N. Y. 20.)

To the Honorable Supreme Court of the State of New York, City and County of New York:

The petition of Morris Frey respectfully shows:

1. That your petitioner is imprisoned or restrained of his liberty in the county jail of the county of New York under a process purporting to be a military warrant issued by one John W. Fleck, as president of a Regimental Court Martial of the 11th regiment, N. G. S. N. Y.
2. That he has not been committed and is not detained by virtue of any judgment, decree, final order, or proceedings issued by any court of the United States, or by any judge thereof, nor is he committed or detained by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or a final order thereof, or by virtue of an execution or other process issued upon such judgment, decree, or final order, as specified in § 2016 of the Code of Civil Procedure.
3. The cause or pretence of the imprisonment or restraint according to the best knowledge and belief of your petitioner is for an alleged fine

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of \$20.00 imposed on your petitioner by the said John W. Fleck as president of said Regimental Court Martial.

That such imprisonment of your petitioner is illegal and unjust for the following reasons, to wit :

1. That your petitioner enlisted when he was under 21 years of age, without the consent of his parent then and now living, which fact was then and now is well known to the regiment aforesaid, and that your petitioner is now under 21 years of age.

2. That at the time of said enlistment the oath of allegiance was not duly administered to your petitioner as required by law.

3. That the Court Martial before which your petitioner was summoned to appear then had not and has not now any jurisdiction over your petitioner.

4. That when your petitioner appeared before said Court Martial he demanded of, but was denied by, the said court, the right to be heard by counsel.

5. That your petitioner was refused the right to be heard by the Appellate Court of Appeal from the decision of said Court Martial.

6. That at the time of your petitioner's enlistment no enlistment roll was given him as required by law.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* issue directed to the warden of the said county jail commanding him to bring and produce the body of your petitioner, Morris Frey, before this honorable court at such time and place as this court shall designate, to the end that your petitioner may be discharged according to the process of law.

Dated, the 19th day of June, 1884.

MORRIS FREY.

(Add verification hereto.)

Petition :—For Custody of Child. (122 N. Y. 238.)

To Hon. GEORGE N. KENNEDY, one of the Justices of the Supreme Court of the State of New York :

The petition of LaFayette E. Pruyn, Jefferson County, N. Y., respectfully shows :

That Tirzah G. Bigelow is now imprisoned and restrained of her liberty by Charles H. Walts at the city of Watertown in said county.

That said Tirzah G. Bigelow has not been and is not committed or detained by virtue of a mandate issued by a court or judge of the United States in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court, nor has she been nor is she committed or detained by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction ; nor by the final order of such a tribunal made in a special proceeding instituted for any cause, nor by virtue of an execution or other process issued upon such judgment, decree or final order, nor by virtue of any judgment,

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decree, final order, or process specified in § 2016 of the Code of Civil Procedure.

That the cause or pretence of the imprisonment and restraint, according to the best knowledge and belief of your petitioner, is that said Charles H. Walts, in the lifetime of Malitta Bigelow, the mother of the said Tirzah G. Bigelow, entered into an arrangement with the said Malitta, the particulars of which are unknown to your petitioner, whereby the said Charles H. Walts should have her care and custody, but he is not, as your petitioner is informed and believes, a relative to, by blood or marriage, or guardian of, the said Tirzah G. Bigelow.

That your petitioner claims and insists that such imprisonment and restraint is illegal in this, to wit :

That said Tirzah G. Bigelow is an infant aged about 8 years and the only child of the late Lyman E. Bigelow and Malitta Bigelow, his wife ; that on or about the 28th day of August, 1884, the said Lyman E. Bigelow died, leaving a last will and testament which was duly admitted to probate by the surrogate of Jefferson County, October 21, 1884, and recorded in said surrogate's office in Book of Wills No. 171 at page 492, and also in the clerk's office of Jefferson County in Book No. 240 of deeds at page 152, on the 8th day of November, 1884.

That said will disposed of the custody of said infant in a clause thereof of which the following is a copy, viz. :

"7. I hereby, pursuant to the statute of the State of New York in such cases made and provided, appoint the said LaFayette E. Pruyne (your petitioner meaning) guardian during her minority of my said daughter Tirzah G. Bigelow ; hereby intending to dispose of, and I do hereby dispose of, the custody and tuition of said daughter during her minority to said Pruyne."

That the said surrogate of Jefferson County on the 24th day of October, 1884, duly issued under his hand and seal of his office, letters of guardianship to your petitioner, he having theretofore taken oath required by law and duly qualified as such guardian, which said letters of guardianship have never been revoked, but still remain in full force and virtue, and as such guardian, your petitioner claims the custody of said infant.

That on or about the 31st day of December, 1886, the said Malitta Bigelow died at the city of Watertown, N. Y.

That an application had been made to the Hon. Pardon C. Williams, one of the justices of the Supreme Court of this State for a writ of *habeas corpus* herein, who on the 18th day of January, 1887, allowed said writ, which was returnable January 24, 1887, at the court-house in Watertown, at which time a return was made and duly traversed, but it appearing on such return that said justice might be a material witness therein and that he drew the will by which your petitioner was made guardian, he declined to entertain the same, and on the 4th day of February, 1887, said writ was dismissed because of such disqualification and without prejudice to a further application, and an order made and entered accordingly ; that no other application has been made for a writ of *habeas corpus* herein.

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WHEREFORE, your petitioner prays that a writ of *habeas corpus* issue directed to Charles H. Walts commanding him to have the body of said Tirzah G. Bigelow by him imprisoned and detained, together with the cause of such imprisonment and detention before your honor at such time and place as may be convenient and proper.

Dated the 4th day of February, 1887.

LAFAYETTE E. PRUYNE,

(*Add verification hereto.*)

Petition :—Sentence Beyond Jurisdiction of Court.

(60 N. Y. 559.)

To the Supreme Court of the State of New York, or to any of the justices thereof, or to any officer authorized to perform the duties of a justice of said court at chambers :

The petition of William M. Tweed shows that he is imprisoned or restrained of his liberty by Joseph L. Liscomb, warden of the penitentiary of the city of New York, and that he is not committed or detained by virtue of any process issued by any court of the United States or by any judge thereof, nor is he committed or detained by virtue of a final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree.

That the cause or pretence of such confinement or restraint, according to the best knowledge or belief of your petitioner, is a warrant, order, or process, a copy of which is hereto annexed,

Your petitioner alleges that his said imprisonment under said pretence is illegal and that its illegality consists in the following, among other things :

1. That the court from which said warrant or process purports to have been issued had no jurisdiction or power to take cognizance of or to try the alleged misdemeanors mentioned in the pretended warrant or process.

2. That the jury upon whose pretended verdict the said pretended sentences were pronounced was not impanelled according to law of the land and had no jurisdiction or power to try the said supposed offences.

3. That the judgment of the court in execution of which the said pretended warrant or process was issued was and is absolutely void for want of jurisdiction to render the same.

4. That the pretended trial and conviction of your petitioner was for one misdemeanor only, for which no more than one year's imprisonment and a fine of \$250 could by law be pronounced, and for such misdemeanor and conviction your petitioner has been imprisoned already for more than one year, and has also paid the fine of \$250.

5. That if the said one year's imprisonment was lawful, which your petitioner denies, each and every pretended sentence of the said court whereby your petitioner was condemned to any further imprisonment or to any further fine was and is void.

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6. That the term of your petitioner's imprisonment under the said pretended warrant or process has expired.

7. That the said warrant or process does not conform to the alleged judgment of the said Court of Oyer and Terminer and is not warranted by the same.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* issue, directed to the said Joseph L. Liscomb, warden of the penitentiary of the city of New York, commanding him to have the body of your petitioner forthwith before the court or officer granting said writ, together with the time and cause of such imprisonment and detention.

Dated, December 14th, 1874.

WILLIAM M. TWEED.

Petition in Extradition Case.

NEW YORK SUPREME COURT.

The People of the State of New York *ex rel.*
Charles A. Young.

agst.

James C. Stout as Agent and Warden of the
State Prison at Auburn, N. Y.

144 N. Y. 699.

The petition of William H. Sullivan herein respectfully shows and alleges :

That Charles Young, the person in whose behalf the writ is applied for, is now imprisoned and restrained in his liberty.

That he is now confined in the State prison at Auburn in the county of Cayuga, N. Y., and the officer or person by whom he is so restrained or imprisoned is James Stout, Esq., agent and warden of said prison.

That he has not been committed, and is not detained, by virtue of any judgment, decree, final order, process, or mandate issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court ; or by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or a final order of such a tribunal made in a special proceeding instituted for any cause or by virtue of an execution or other process issued upon such a decree or final order.

That the cause or pretence of such imprisonment or restraint according to the best knowledge and belief of your petitioner is by virtue of an alleged judgment of the court of sessions of Monroe County, N. Y.

That annexed hereto is a copy of the mandate by virtue of which he is imprisoned or restrained.

That said imprisonment is illegal and contrary to law on the following grounds :

That he (said Young) was born in England and has been since birth,

Art. 2. What Court may Grant Writ and Application therefor.

and is now, a subject of her Britannic Majesty, the Queen of the United Kingdom of Great Britain and Ireland.

That he (said Young) was arrested in England within the political jurisdiction of her Britannic Majesty, the Queen of the United Kingdom of Great Britain and Ireland, and extradited therefrom for the alleged commission of a crime of "assault with intent to commit murder," in pursuance of a treaty and its supplement between the United States of America and her Britannic Majesty, and in pursuance of said treaty delivered by the authorities of Great Britain to the authorities of the United States, and subsequently by the authorities of the United States to the authorities of the State of New York, to be tried for the said crime or offence of "assault with intent to commit murder," specified in the warrant of extradition and no other.

That he was tried by the authorities of the State of New York for the crime of "assault with intent to commit murder," being the same crime for which he was extradited, in the court of sessions of Monroe County, N. Y., and was duly acquitted of said crime for which he was extradited, to wit: "assault with intent to commit murder."

That the authorities of the county of Monroe, State of New York, tried him against his objection for the crime of "assault with intent to commit murder," as defined by the Penal Code of the State of New York, being a crime different and distinct from that for which he was extradited, and also being a crime which has never been and is not now extraditable, and without giving him an opportunity to return to England, from which he had been extradited as aforesaid, and convicted him, the said Charles Young, at said court of sessions of Monroe County, held at Rochester, N. Y., on the 11th day of April, 1894, in violation of said treaty and supplement and the Constitution and laws of the United States, and which court was then held at the common council chambers in the city hall in Rochester, N. Y., that being the place where the terms of the county court of Monroe County for the trial of issues of fact by a jury were then, ever since have been, and are now, held.

That subsequently, and on the 16th day of July, 1894, he, the said Charles Young, was brought before the said court of sessions at another term and at No. 71 Powers Building, in Rochester, N. Y., a place where no term of said county court for the trial of issues of fact by a jury was held, for sentence upon and for said illegal conviction.

That the term of which he, said Young, was convicted as aforesaid, ended on May 5th, 1894, and although the term of said court of sessions began on May 7th, 1894, and ended on June 16th, 1894, the said term at which he, the said Young, was brought for sentence did not begin until June 18, 1894.

That when said Young was brought before said court of sessions on the said 16th day of July, 1894, for sentence as aforesaid, and at the place aforesaid, he appeared by Messrs. H. J. & W. H. Sullivan, his attorneys and counsel, and then and there moved in arrest of judgment and for a discharge, and objected to any sentence being imposed upon him, the said Young, on the following grounds:

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1. That he, said Young, is a British subject, having been extradited from England on the specific charge of "assault with intent to commit murder," and having been acquitted of such charge he therefore demands that he be given his liberty and allowed a reasonable time to return to England, in accordance with the treaty and acts of Congress relative thereto.

2. The said court of sessions had no jurisdiction to pronounce judgment, because it was not the same court at which he, said Young, was tried and convicted, he having been tried and convicted at the March, 1894, term of said court of sessions, while the said term at which he was brought for sentence began in June, 1894.

3. That the place at which the court of session was held on said July 16th, 1894, was not a place designated by law for the holding of courts of session.

4. That said Young had been sentenced by the Monroe County court of sessions at the same term of the court at which he was convicted, and that said sentence and said judgment was then still in force, and that the last mentioned court of sessions had no jurisdiction to pronounce another and different sentence and judgment.

5. That the only time that the Monroe County court of sessions could be held was when the county court for the trial of issues of fact by a jury was held, and that the last term of said county court for the trial of issues of fact by a jury began in May, and ended in June, 1894.

6. That the court of sessions at which he, said Young, was arraigned for sentence had no jurisdiction or legal right to pronounce sentence, or judgment on him, and that therefore he, said Young, demanded that the right given him by the treaty and the acts of Congress relative thereto, should be allowed, that he be discharged from further imprisonment and be allowed a reasonable time to return to England, from which he was extradited.

That the said court of sessions on said July 16th, 1894, thereupon overruled each and every of said Young's said objections as aforesaid, and after giving him an objection to each of the acts of said court of sessions in overruling said objections and each, thereupon sentenced said Young to imprisonment in the State prison at Auburn, N. Y., for a period of four years and five months.

That the pronouncing of said sentence of July 16th, 1894, at No. 71 Powers Building in Rochester, N. Y., was in violation of the laws of the State of New York; said place not being a legal place for the pronouncing of said judgment or sentence and the holding of said court.

That said judgment or sentence was not pronounced until the 16th day of July, 1894, and said Young was convicted by said jury on the 11th day of April, 1894, at a court of sessions different than that at which said judgment or sentence was pronounced, and at a different place than the one used for the holding of the Monroe County court for the trial of issues of fact by a jury at the common council chambers in the city hall in Rochester, N. Y.

That said Monroe County court of sessions was illegally held at a time when no county court for the trial of issues of fact by a jury was in ses-

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sion; that therefore said court had no jurisdiction of the person of said Young, and said sentencing and pronouncing of judgment was illegal and without jurisdiction, and said court had no jurisdiction to pronounce said judgment or sentence, and that said Young is now illegally restrained of his liberty; that he, said Young, has no means to pay the disbursements and fees in this matter.

Wherefore, this application is made to issue a writ of *habeas corpus* in behalf of said Charles Young pursuant to the provisions of the Code of Civil Procedure.

Dated, at the city of Rochester, N. Y., this September 26, 1894,

WILLIAM H. SULLIVAN,

(Add verification hereto.

Petitioner.

Petition to Obtain Custody of Infant.—Short Form.

To the Supreme Court of the State of New York :

The petition of Alonzo Freeman, of the city of Kingston, Ulster County, respectfully shows: That he is the husband of Celia Freeman, who also resides in said city but apart from your petitioner. That said Celia Freeman has the custody of an infant child of your petitioner and his said wife, named Henry Freeman, aged thirteen years.

That your petitioner is engaged in business as a master mechanic in said city and is able and willing to support said child; that he resides with his mother, the grandmother of said child, who is willing to take the care of said child so far as may be necessary, and that the petitioner is desirous that said child shall have a home with your petitioner and its grandmother. That his said wife has no means of her own for the support or education of said child.

Wherefore your petitioner prays a writ of *habeas corpus* to deliver said child from the custody of its mother, and that your petitioner may be awarded the custody of said child.

(Signature and verification as to pleading.)

Precedent for Affidavit.

ULSTER COUNTY, ss. :

John F. Cloonan, of the city of Kingston, being duly sworn, says that he is attorney for Patrick Larkin, who subscribed and verified the petition for a writ of *habeas corpus* hereto annexed. That there is no Special or General Term of the Supreme Court now in session in the county of Ulster, where the petitioner is confined. That there is no justice of the Supreme Court in the county of Ulster, or any officer authorized to perform his duties except the county judge of said county, who is incapacitated from performing the duties of his office by reason of sickness.

Wherefore the petitioner applies to the county judge of the county of Greene, an adjoining county, for the writ prayed for in the petition.

(Jurat.)

(Signature.)

It is held (*People v. Barnett*, 13 Abb. 8), that an affidavit is nec-

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essary as to judge being disqualified. The affidavit should be explicit, and it is not enough for the deponent to state he cannot find a judge, and it should not be made several days before the application. Id. By *People v. Folmsbee*, 60 Barb. 480, and *People ex rel. v. Hanna*, 3 How. 39, it is held that this does not affect the jurisdiction.

Writ of Habeas Corpus.

The People of the State of New York, to GEORGE YOUNG, Sheriff of the County of Ulster:

We command you that you have the body of Richard Stokes, by you imprisoned and detained as it is said, together with the time [L. s.] and cause of such imprisonment and detention, by whatsoever name the said Richard Stokes is called or charged, before William S. Kenyon, Esq., county judge of Ulster County, at his chambers in the city of Kingston, in the county of Ulster, at nine o'clock in the forenoon, on the 2d day of May, 1887, to do and receive what shall then and there be considered concerning the said Richard Stokes, and have you then there this writ.

Witness, Hon. William S. Kenyon, county judge of Ulster County at Kingston, this 31st day of June, 1887. JACOB D. WURTS,

Clerk.

Indorsed :—" The within writ allowed this 31st day of April, 1887."

WILLIAM S. KENYON.

County Judge of Ulster County.

The tender of fees and bond are not required in case a district attorney or the attorney-general applies for the writ. § 2002. Otherwise, §§ 2000 and 2001 must be complied with.

Writ. (143 N. Y. 219.)

The People of the State of New York, to CHARLES S. SEEMAN, Sheriff of the County of Tompkins in the State of New York:

We command you that you have the body of Frederick L. Taylor, by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Frederick L. Taylor is called or charged, before Hon. Walter Lloyd Smith, a justice of the Supreme Court of the State of New York, at the court-house in the village of Watkins in the county of Schuyler in the State of New York, at 2 o'clock in the afternoon on the 26th day of March, 1894, to do and receive what shall then and there be considered concerning the said Frederick L. Taylor, and have you then and there this writ.

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Witness: Hon. Walter Lloyd Smith, a justice of the Supreme
 [L. s.] Court of the State of New York, at Elmira, Chemung County,
 N. Y., this 24th day of March, 1894.

D. N. HELLER,

Clerk.

Indorsed:—"The within writ allowed this 24th day of March, 1894."

WALTER LLOYD SMITH,

Justice Supreme Court.

Writ. (122 N. Y. 238.)

The People of the State of New York, to CHARLES H. WALTS:

We command you that you have the body of Tirzah G. Bigelow by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name she shall be called or charged, before the Hon. George N. Kennedy, at the court-house in the city of Watertown, on the 12th day of February, 1887, at 10 o'clock A. M., to do and receive what shall then and there be considered concerning the said Tirzah G. Bigelow, and have you then and there this writ.

Witness: Hon. George H. Kennedy, one of the justices of the
 [L. s.] Supreme Court of the State of New York, the 5th day
 of February, 1887.

O. D. GREENE,

Clerk.

Indorsed:—"The within writ allowed this 5th day of February, 1898.

"GEORGE H. KENNEDY,

"Justice Supreme Court."

Writ. (60 N. Y. 559.)

The People of the State of New York, to JOSEPH L. LISCOMB, *Warden of the Penitentiary of the City of New York, greeting:*

We command you that you have the body of William M. Tweed by you imprisoned and detained, as it is said, together with the time and cause of such detention and imprisonment, by whatsoever name he shall be called or charged, before the Court of Oyer and Terminer in and for the city and county of New York at the court-house in the city of New York on the 17th day of December, 1874, at 11 o'clock A. M. of that day, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

Witness: Hon. A. R. Lawrence, justice of the Supreme Court,
 [L. s.] the 15th day of December, 1874.

By the Court:

WILLIAM WALSH,

Clerk.

Indorsed:—"The within writ allowed this 15th day of December,
 1874.

"A. R. LAWRENCE,

"Justice Supreme Court."

 Art. 2. What Court may Grant Writ and Application therefor.

Order for Writ.

NEW YORK SUPREME COURT.

Caption in Appellate Division.

The People of the State of New York *ex rel.*
Charles Young.

agst.

144 N. Y. 699.

James C. Stout, agent and warden of State
Prison at Auburn, N. Y.

On reading and filing the petition of William H. Sullivan, one of the attorneys for the relator, verified this day, asking for a writ of *habeas corpus* herein, and upon motion of Messrs. H. J. & W. H. Sullivan, attorneys and of counsel for said relator, it is

Ordered :—That a writ of *habeas corpus* issue under the hand and seal of the county clerk of Monroe County, and allowed by said presiding justice for this court, directed to said defendant, requiring him to produce the body of the relator before this General Term at the place aforesaid on the 4th day of October, 1894, at 10 o'clock A. M., to the end that said General Term may inquire into the detention of said relator, and that a copy of said writ be served personally on the district attorney of Monroe County or one of his assistants at his office in Rochester, N. Y., and that a copy of said writ be mailed to the district attorney of Cayuga County and that said service and mailing be made on or before September 27th, 1894.

K. P. SHEDD,

Clerk.

Writ. (144 N. Y. 699.)

The People of the State of New York, to JAMES C. STOUT, *Esq., Agent and Warden of the State Prison at Auburn, N. Y.:*

We command you that you have the body of Charles Young, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said Charles Young shall be called or charged, before the General Term of the Supreme Court of the State of New York in and for the Fifth judicial department at a term thereof to be held at No. 735 Powers Building, seventh floor, in the city of Rochester, county of Monroe, N. Y., on the 4th day of October, 1894, at 10 o'clock A. M., to do and receive what shall then and there be considered concerning the said Charles Young, and that you have then and there this writ.

Witness : Hon. Charles C. Dwight, presiding justice and one of
[L. s.] the justices of the said Supreme Court, General Term, this
26th day of September, 1894.

K. P. SHEDD,

Clerk.

Indorsed :—" The within writ allowed this 26th day of September,
1894.

"CHARLES C. DWIGHT,

" Justice Supreme Court."

 Art. 3. Duty of Court, Officer, or Other Person Relative to Writ.

ARTICLE III.

DUTY OF COURT, OFFICER, OR OTHER PERSON RELATIVE TO WRIT. §§ 2025, 2051, 2052, 2053, 2020, 2065.

§ 2025. When writ to issue without application.

Where a justice of the Supreme Court, in court or out of court, has evidence, in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty, within the State; or where any other judge, authorized by this article to grant the writs, has evidence, in like manner, that any person is thus imprisoned or restrained, within the county where the judge resides, he must issue a writ of *habeas corpus* or a writ of *certiorari*, for the relief of that person, although no application therefor has been made.

§ 2051. Penalty for violating the last section.

If a court, or judge, or any other person, in the execution of a judgment, order, or other mandate, or otherwise knowingly violates, causes to be violated, or assists in the violation of, the last section, he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars. He is also guilty of a misdemeanor; and, upon conviction thereof, shall be punished by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding six months, or by both in the discretion of the court.

2 R. S. 563, § 60 and part of § 64.

§ 2052. Id.; for concealing prisoner, etc., to avoid writ.

Any one, having in his custody, or under his power, a person entitled to a writ of *habeas corpus* or a writ of *certiorari*, as prescribed in this article, or a person for whose relief a writ of *habeas corpus* or a writ of *certiorari* has been duly issued, as prescribed in this article, who, with intent to elude the service of the writ, or to avoid the effect thereof, transfers the prisoner to the custody, or places him under the power or control, of another, or conceals him, or changes the place of his confinement, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section.

2053. Id.; for aiding, etc.

A person who knowingly assists in the violation of the last section, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section but one.

§ 2020. When writ must be granted; penalty for refusing.

A court or a judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article, unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court, who assents to the violation, forfeits to the prisoner one thousand dollars, to be recovered by an action in his name, or in the name of the petitioner to his use.

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

The act of issuing a *habeas* is held to be ministerial and not judicial. *Nash v. The People*, 36 N. Y. 607.

§ 2065. Penalty for refusing copy of process, etc.

An officer or other person, who detains any one by virtue of a mandate, or other written authority, must, upon reasonable demand, and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of *habeas corpus* or a writ of *certiorari*, in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

ARTICLE IV.

RETURN MUST BE MADE TO WRIT AND NOTICE OF HEARING.

§§ 2024, 2026, 2027, 2037, 2038.

§ 2024. When writ sufficient.

The writ of *habeas corpus* or the writ of *certiorari* shall not be disobeyed, for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner is designated, either by his name of office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person upon whom the writ is served, is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

2. If the person directed to be produced is designated by name, or otherwise described in any way, so as to be identified as the person intended.

§ 2026. Return; its contents.

The person upon whom either writ has been duly served, must state, plainly and unequivocally, in his return:

1. Whether or not, at the time when the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

2. If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given, if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause, and by what authority, the transfer was made.

The return must be signed by the person making it, and, unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.

2 R. S. 563, § 32.

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

§ 2027. Habeas corpus; body of prisoner to be produced, unless, etc.

The person, upon whom a writ of *habeas corpus* has been duly served, must also bring up the body of the prisoner in his custody, according to the command of the writ, unless he states, in his return, that the prisoner is so sick or infirm, that the production of him would endanger his life or his health.

§ 2037. Custody of prisoner pending the proceedings.

Pending the proceedings, and before a final order is made upon the return, the court or judge, before which or whom the prisoner is brought, may either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody, as his age and other circumstances require.

§ 2038. Notice to person interested in detention.

Where it appears, from the return to either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made, until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time, as the court or judge prescribes, as follows:

1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney.

2. In every other case, to the district attorney of the county, within which the prisoner was detained, at the time when the writ was served.

For the purpose of an appeal, the person to whom notice is given as prescribed in the first subdivision of this section, becomes a party to the special proceeding.

Under the provisions of § 2038, the district attorney should have notice of a proceeding by *habeas corpus* where a person has been convicted of a criminal offence, and the county judge has no right to discharge a prisoner without such notice. *People v. Carter*, 48 Hun, 166, 14 Civ. Pro. 241.

Failure to give notice to district attorney when required by law, renders the granting of an order of discharge irregular. *People ex rel. Navagh v. Frink*, 41 Hun, 188, 4 St. Rep. 162. Section 2038 requires notice of the hearing to be given to the person interested in continuing the imprisonment of the relator. Such notice should be given to the plaintiff in a divorce suit, where defendant seeks to be liberated on *habeas corpus* from a commitment for failure to pay alimony and counsel fees. *Peo. ex rel. Clark v. Grant*, 111 N. Y. 587. A copy of the petition need not be served; it is sufficient to serve a notice giving the time and place where the writ is made returnable. *Ex parte Beatty*, 12 Wend. 229. Notice must be given, although

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

the party interested resides out of the county. *People v. Pelham*, 14 id. 48. In case of criminal contempt, notice must be given the district attorney. *People v. Cassells*, 5 Hill, 164. An order to show cause may, upon same grounds stated as in ordinary case, take the place of the notice of eight days.

In computing the term of six months to which imprisonment is limited, under § 111 of the Code, the time during which the person is out of jail in the custody of his counsel, pending *habeas corpus* proceedings, is not to be included. *People ex rel. Clark v. Grant*, 14 Civ. Pro. 37. It is proper for a person to be committed to the custody of the sheriff pending a trial as to whether he should be recommitted to the State's prison under an original sentence for violation of the conditions upon which his sentence was commuted. *People v. Burns*, 77 Hun, 95, affirmed, 143 N. Y. 665. Upon the writ of *certiorari* to inquire into the cause of detention, the party is required to return to the judge issuing the writ, by what right he holds the custody of the person detained. Under this requirement, he returns simply the commitment. *People ex rel. Taylor v. Seaman*, 8 Misc. 153, 59 St. Rep. 463, 29 Supp. 329. In *People ex rel. Trainor v. Baker*, 89 N. Y. 460, where the petition on application for a writ to inquire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment, and the writ did not require the keeper to return the warrant or other instrument by which he detained the relator, but simply required the return of the cause of his imprisonment, it was held that the certified minutes of the court showing the judgment and sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant.

Production of the commitment is not sufficient. *Matter of Haller*, 3 Abb. N. C. 65. The sworn statement of a party on whom the writ was not served is not admissible as a return. *People ex rel. v. Mercein*, 8 Paige, 47. An officer making a return should show that the prisoner is not under his control. *Matter of Stacy*, 10 Johns. 328. A sheriff's return should be construed liberally. *People v. Nevins*, 1 Hill, 154. A return may be amended. 5 Wait's Pr. 532, and cases cited; 3 Hill, 657, note; *Matter of Hobson*, 40 Barb. 34. The answer in writing signed by the party to whom the writ is addressed, stating the time and cause

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

of the caption and detention of the prisoner, and his production before the court or judge, or if the prisoner is not produced, then the reason for not producing him, constitutes the return.

This should be made without delay. It is not absolutely necessary that the party to whom the writ is addressed should appear before the court if the prisoner is produced. Hurd on Habeas Corpus, 235. The return should be as was held by Chancellor Kent in case of non-production of the party, in case of a military officer, that he is not in his possession or power. *Matter of Stacy*, 10 Johns. 328. The return in case of non-production of the prisoner must be full and complete, and an evasive return will not be tolerated. *Rex v. Winton*, 5 T. R. 89. The time and cause of the taking must be stated in the return and body produced, and to justify the detention sufficient authority must be shown.

The entire history of the proceeding may be set out in the return, and copies of all papers should be annexed. *Shaw v. Smith*, 8 Ind. 485; *Rex v. Clark*, 3 Salk. 349. When an officer is called on for a return he should produce a copy of the record showing the commitment. *Randall v. Bridge*, 2 Mass. 549.

The production of the body is a necessary element of the writ which issues for the purpose of protecting the liberty of the person. As in ordinary proceedings the determination of the right to his liberty is the matter for ultimate decision, the writ begins with a demand for that liberty, and demands his presence before the court for summary determination. As has heretofore been said and appears by the foregoing section, the return must give the reason for non-production in case of sickness or infirmity. Without the production of the body the case has no status. *In re Lampert*, 10 Week. Dig. 109.

The person upon whom the writ has been duly served must bring up the body of the prisoner under peril in case of neglect of attachment and commitment. *People ex rel. James v. Society for the Prevention of Cruelty to Children*, 19 Misc. 678.

Precedent for Notice to Interested Party.

To J. N. VANDERLYN, Esq., District Attorney of Ulster County:

Please take notice that a writ of *habeas corpus*, to inquire into the imprisonment of Richard Stokes, now confined by George Young, sheriff

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

of Ulster County, in the common jail of said county, on a commitment made by a court of special sessions in the town of Marbletown, has been issued, and made returnable on the 10th day of May, 1887, before the Hon. William S. Kenyon, county judge of Ulster County, at his chambers in the city of Kingston, at ten o'clock in the forenoon of that day.

Dated April 26, 1887.

JOHN F. CLOONAN,
Attorney for Petitioner.

Precedent for Return, where Person is in Custody.

(38 Hun, 280.)

To the Hon. WILLIAM S. KENYON, County Judge of Ulster County :

In obedience to the writ of *habeas corpus* hereto annexed, I certify and return : That on the 31st day of April, 1887, and before the said writ came to me, the said Richard Stokes was in my custody and detained by me in the county jail of the county of Ulster, under and by virtue of a commitment, a copy of which is hereto annexed, issued by F. D. L. Montanye, Esq., a justice of the peace of the town of Marbletown in said county. That the said Richard Stokes is still in my custody under said commitment, all of which I certify and have now here the body of said Richard Stokes, as by said writ I am commanded.

GEORGE YOUNG,
Sheriff.

Precedent for Return where Person is not in Custody of Party to whom Writ is Directed.

SUPREME COURT.

In the Matter of the Application of Alonzo Freeman for a Writ of <i>Habeas Corpus</i> , to bring up the body of Henry Freeman, infant.	}
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To the Supreme Court of the State of New York :

The return of Celia Freeman alleges and shows to the court that the infant, Henry Freeman, is not and has not been at any time for three months last past under her control or in her custody.

That as she is informed and believes, the said Henry Freeman is now at Litchfield, in the State of Connecticut, and your petitioner cannot produce the body of said Henry Freeman.

Dated December 28, 1885.

CELIA FREEMAN.

(*Add verification.*)

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

Return.

NEW YORK SUPREME COURT.

In the Matter of the Application of Frederick L. Taylor for a writ of <i>habeas corpus</i> to bring up the body of him, the said Frederick L. Taylor.	}	143 N. Y. 219.
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To the Hon. WALTER LLOYD SMITH, Justice of the Supreme Court :

In obedience to the writ of *habeas corpus* hereto annexed I certify and return that on the 22d day of March, 1894, and before said writ came to me, the said Frederick L. Taylor was in my custody and detained by me in the county jail of Tompkins County under and by virtue of the mandate, a copy of which is hereto annexed, issued by the Court of Oyer and Terminer of the county of Tompkins, committing the said Frederick L. Turner to my custody as sheriff of Tompkins pending a charge of criminal contempt. That the said Frederick L. Taylor is still in my custody under said mandate, all of which I certify, and have now here the body of said Frederick L. Taylor, as by said writ I am commanded.

Dated March 26th, 1894.

CHARLES S. SEAMAN,
Sheriff of the County of Tompkins.

Return Setting Out Jurisdiction.

The People of the State of New York <i>ex rel.</i> Morris Frey,	}	100 N. Y. 20.
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agst.

The Warden of the County Jail of New York County and the 11th Regiment, N. Y. V.	}	
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The return of Captain John W. Fleck, president of the court martial, to the writ of *habeas corpus* herein, respectfully shows :

1. That it is true that the petitioner was under age when he enlisted, but it is not true that he enlisted without the consent of his parent or guardian, as appears from the enlistment papers presented herein.
2. That said enlistment was legal and in proper form and that said Frey was duly sworn in accordance with the Military Code.
3. That the court martial before which the said petitioner was tried was convened by special orders and in compliance with law, and the petitioner was duly summoned before said court martial for certain delinquencies, that he appeared and after due hearing was fined \$20.
4. That it is not true that the petitioner was denied the right to appear by counsel, the case was adjourned to a later evening of which the petitioner had notice, and also of his right to appear by counsel.

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

5. That as this respondent is informed and believes, that it is not true that the petitioner was denied the right of appeal.

6. That said Frey was duly committed in proper form, to which your respondent begs leave to refer to as part of this return.

JOHN W. FLECK.

(*Add verification hereto.*)

Return Setting Out Facts Fully of Detention of Child.

(122 N. Y. 238.)

To the Hon. GEORGE H. KENNEDY, Justice of the Supreme Court :

In obedience to the writ allowed by you on the 5th day of February, 1887, and on the 9th day of February, 1877, served upon me, and which is hereto annexed, I make the following return :

I have in my custody Tirzah G. Bigelow named in said writ, and in accordance with the commands of said writ served on me, I produce her in person before your honor with the following statement as to the way said Tirzah G. Bigelow came into my family and my reason for desiring to keep her, the said Tirzah G.

The said Tirzah G. was seven years old September 26, 1886. She is the only living child of the marriage of Lyman E. Bigelow with Malitta Henderson, December 19th, 1878. Lyman E. Bigelow died in the year 1884, and his wife, Malitta Bigelow, died December 31, 1886. That prior to the death of said Lyman E. Bigelow, his wife, the said Malitta Bigelow, owing to differences between them, separated from him September 19th, 1883, going to Watertown to reside with her father, John H. Henderson, bringing with her the said Tirzah G., who remained with the said Malitta, her mother, to the day of her death. The facts in regard to the separation and the custody of the child, Tirzah G., are set forth in a petition to the Supreme Court verified by Malitta Bigelow, October 13, 1885, which deponent believes to be true, presented to the court November 10, 1885, and the affidavits in opposition thereto by LaFayette E. Pruyn and John C. McCartin, and the order made by Hon. John C. Churchill thereon, and entered in the clerk's office of Jefferson County, N. Y., November 10, 1885, is referred to as part of this return, and a copy of the same is hereto annexed. That prior to the death of said Lyman E. Bigelow he made his last will and testament, which has been admitted to probate by the surrogate of Jefferson County, a copy of which is hereto annexed as forming part of this my return to the writ aforesaid.

And I further state on information and belief that at the time when said Lyman E. Bigelow so made his will he, said Bigelow, entertained bitter feeling against his said wife, and in the making of said will he was largely influenced in its provisions by his bitterness of feeling against his said wife, and that the provision therein appointing LaFayette E. Pruyn testamentary guardian of the said Tirzah G. was so made, not with a view of the actual benefit of said Tirzah G., but on the contrary to vex and harass and annoy his wife, and was so made by him to gratify his revengeful spirit.

Art. 4. Return Must be Made to Writ and Notice of Hearing.

And I further return as a reason why said Tirzah G. is retained by me the following: That said Malitta Bigelow for two years or more prior to her death had the consumption, and it was known to her that she could not long survive, and her great anxiety was for her child, the said Tirzah G., and to that end applied to deponent and his wife, and expressed to them her wish that on her death deponent and his wife would take the said Tirzah G. into their family as their own child, care for, educate, and bring her up as such, and the said Tirzah was by her mother told that after her death she, the said Tirzah G., was to become and be an inmate of the family of the deponent and his wife, and to that end deponent and his wife for at least a year and a half cultivated the acquaintance of the said Tirzah G. That on the happening of the said event—the death of her mother—and the taking of said Tirzah G. into deponent's family, pursuant to the request of her mother, she, said Tirzah G., would not be going among strangers to her, and deponent and his wife but a few days before the death of the mother of said Tirzah G., and at the request and express wish of said Malitta Bigelow, promised her in response to her dying request that they would take, care for, and bring up to the best of their ability the said Tirzah G., and after the death of Mrs. Bigelow in fulfilment of the said promise, by and with the consent of the grandfather of said Tirzah G., deponent and his wife took said Tirzah G. into their family, where she has ever since remained and now is.

That after and before the death of her mother the said Tirzah G. knew and understood that it was the wish and desire of her mother that she should go into the family of deponent, and she went willingly and is contented, and happy, and expresses a desire to remain in the family of deponent, having apparently become strongly attached to deponent and his wife, as deponent and wife have become strongly attached to her. Deponent has no children of his own.

And I further return that, as I am informed and believe, the said La-Fayette Pruyn recently lost his wife, has no child or children of his own, and proposes, if awarded the custody of said Tirzah G., to put her in the family of a stranger to said Tirzah G., of no kin to her, and if such be done deponent believes it would make the said Tirzah G. unhappy and discontented and would not be for the best interests of the said child, and would be detrimental to the health of said Tirzah G., as deponent believes.

And I further respectfully return that in view of the wish and desire often and earnestly expressed of the mother of said Tirzah G., and of my and my wife's promises to her, I have deemed it my duty to act in regard to the interest of said Tirzah G. as I have, and to submit this, my return, invoking the equitable powers of the court to do in relation thereto what to it seems just and right. Referring to and adopting the annexed affidavit of John H. Henderson, the facts alleged therein I allege on information and belief to be true as forming part of this my return.

All of which is respectfully submitted.

Dated, February 12th, 1887.

(Add verification hereto.)

C. H. WALTERS.

 Art. 4. Return Must be Made to Writ and Notice of Hearing.

Return. (60 N. Y. 559.)

The undersigned warden of the New York penitentiary on Blackwell's Island respectfully returns and shows, that he received the annexed paper marked A on the 15th day of December, A. D. 1874, at 3:25 P. M., at which time there was in the New York penitentiary of which he is warden the body of William M. Tweed, whom he believes to be the person named in said paper marked A, and who was so there under custody as being the person named in the original paper, of which the annexed paper, marked B, is a copy, and the original whereof I now produce, and which I received on the 29th day of November, A. D. 1873, together with the body of the said Tweed, whom I have had and retained ever since under and by virtue of said original paper or warrant of commitment, and so returning the undersigned produces the body of said prisoner in obedience to the command expressed in paper A.

JOSEPH LISCOMB,
Warden of the Penitentiary.

Return—Extradition. (144 N. Y. 699.)

SUPREME COURT. GENERAL TERM. FIFTH DEPARTMENT.

The People <i>ex rel.</i> Charles Young, <i>agst.</i>	}	James C. Stout, as agent and warden of State Prison at Auburn, N. Y.
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The defendant for his return to the writ of *habeas corpus* served upon him heretofore, hereby returns that pursuant to the said writ he hereby produces the said Charles Young and has him in court as by said writ commanded, and the said original writ is hereto annexed.

The defendant further returns upon information and belief that on or about the 15th day of June, 1893, the said Charles Young was indicted by the grand jury of the county of Monroe for the crime of assault in the first degree, which indictment was in the usual form containing three counts, one count for assault in the first degree, and two counts for assault in the second degree; that said Charles Young, when defendant had no knowledge or information, fled from the justice of the State of New York, and was subsequently arrested in the city of Southampton, England, but said Young was never arrested or arraigned upon said indictment until after he was extradited from England as hereinbefore mentioned.

That at the time said Charles Young fled from justice of the State of New York he was not a subject of her Britannic Majesty, the Queen of the United Kingdom of Great Britain and Ireland, but had renounced

Art. 4. Return Must be Made to Writ and Notice of Hearing.

all allegiance to her Britannic Majesty, and did file his declaration so-called in the clerk's office of the County of Monroe, N. Y.

That the application for the extradition of said Charles Young was first made to the Executive Department of the State of New York, and from that department the papers on which said application was based were certified to the Department of State at Washington, where they were duly authenticated and a warrant issued by the President of the United States, and the papers were then further certified as a proper case for extradition by the Secretary of the British Legation residing at the city of Washington, D. C., and duly authenticated as evidence of the facts therein contained in any country or territory of her Britannic Majesty. That said papers so authenticated and upon which the application of the said Charles Young was based contained, among other things, the original of the warrant, information, depositions, and the indictment upon which he was afterwards tried, which depositions were taken as provided by the rules and practice in such cases, and contained a statement of the facts constituting the alleged offence for which extradition was asked. That said facts set forth in the depositions accompanying the papers were the same as those upon which the indictment was found and which were afterwards proven at the trial of the said Charles Young.

The defendant further returns upon information and belief: that the duly authorized agent of the United States, Frank I. Hawley, went to England with the papers aforesaid and the warrant issued by the President of the United States, and presented said papers authenticated as aforesaid to the court and authorities having jurisdiction over such matters, where a hearing was had at which said Charles Young was heard and represented by counsel, and it was there adjudged and determined that the papers presented by the agent of the United States made a proper case in the opinion of the said tribunal for the surrender of said Charles Young, and it was then and there adjudged and determined that said Charles Young should be surrendered to the agent of the United States to be by said agent returned to the United States, there to be tried upon the facts and indictments set forth in said papers. That said Charles Young was returned to the United States and tried for the same offence or offences for which he was surrendered, and convicted thereof, to wit, the crime of assault in the second degree and was for the felony whereof he was convicted in the court of sessions in the county of Monroe to be imprisoned at the State prison at Auburn, N. Y., for a term of four years and five months, which conviction still remains in full force and effect.

Defendant further returns upon information and belief that the practice of preparing information or indictments in the Kingdom of Great Britain is practically the same as it is in the State of New York, and that it is the practice to draw an indictment containing different counts, some being in a lesser degree of the same crime, and that the offence in Great Britain is the same as assault in the first degree in the State of New York, and that the power of the jury to determine the degree of crime is absolute both in the State of New York and Great Britain.

Art. 5. Proceedings on Return.

Defendant further returns that the said Charles Young is not confined or restrained of his liberty in violation of any law of the State of New York or of the United States or of the Constitution of the United States or in violation of any treaty between the United States and her Britannic Majesty.

Defendant further returns that the alleged irregularity in the conviction of this relator has been called to the attention of the Department of State at Washington, and to the attention of the British Legation, and that they have refused to take any action in the matter or to take any proceeding for the release of the said Charles Young, after having the facts in his case laid before them.

All of which is respectfully returned.

Dated, October 12, 1894.

JAMES C. STOUT,
Warden.

ARTICLE V.

PROCEEDINGS ON RETURN. §§ 2031, 2032, 2033, 2034, 2036,
2039, 2040.

§ 2031. Proceedings on return of habeas corpus.

The court or judge, before which or whom the prisoner is brought by virtue of a writ of *habeas corpus*, issued as prescribed in this article, must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter or for some other cause.

§ 2032. When prisoner to be remanded.

The court or judge must forthwith make a final order to remand the prisoner, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction.
2. By virtue of the final judgment or decree of a competent tribunal, of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.
3. For a criminal contempt, defined in § 8 of this act, and specially and plainly charged in a commitment, made by a court, officer, or body, having authority to commit for the contempt so charged.

§ 2033. When to be discharged in civil cases.

If it appears upon the return, that the prisoner is in custody, by virtue of a mandate in a civil cause, he can be discharged only in one of the following cases:

1. Where the jurisdiction of the court which, or of the officer who, issued the mandate, has been exceeded, either as to matter, place, sum, or person.

Art. 5. Proceedings on Return.

2. Where, although the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterwards, the prisoner has become entitled to be discharged.

3. Where the mandate is defective in a matter of substance required by law, rendering it void.

4. Where the mandate, although in proper form, was issued in a case not allowed by law.

5. Where the person, having the custody of the prisoner under the mandate, is not the person empowered by law to detain him.

6. Where the mandate is not authorized by a judgment, decree, or order of a court, or by a provision of law.

2 R. S. 563, § 41.

§ 2034. The last section qualified.

But a court or judge, upon the return of a writ issued as prescribed in this article, shall not inquire into the legality or justice of any mandate, judgment, decree, or final order, specified in the last section but one, except as therein stated.

§ 2036. Id.; when prisoner may be committed to another officer.

Where a prisoner is not entitled to his discharge, and is not bailed, he must be remanded to the custody, or placed under the restraint, from which he was taken, unless the person, in whose custody, or under whose restraint he was, is not lawfully entitled thereto; in which case, the order remanding him must commit him to the custody of the officer or person so entitled.

§ 2039. Prisoner may controvert return; proofs thereupon.

A prisoner, produced upon the return of a writ of *habeas corpus* may, under oath, deny any material allegation of the return, or make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Thereupon the court or judge must proceed in a summary way to hear the evidence, produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.

§ 2040. Proceedings, etc., of prisoner.

Where the return to a writ of *habeas corpus* states that the prisoner is so sick or infirm, that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return, and dispose of the matter, as if a writ of *certiorari* had been issued.

If the restraint is not alleged to be by virtue of legal process the truth of all matters returned may be inquired into. *People v. Cassells*, 5 Hill, 164. Material facts stated in return not denied by the party brought up must be taken to be true. *People ex rel. Evans v. McEwen*, 67 How. 105. The facts contained in the return must be first inquired into. *Squire's Case*, 12 Abb. 38. Illegal restraint must be either proved or admitted. *People v. Cooper*, 1 Duer, 709. If no question of fact is raised the question is one of law as upon a demurrer. *Bennac v. People*, 4 Barb. 31;

Art. 5. Proceedings on Return.

Matter of Decosta, 1 Park. 129. See 3 Hill, 658, note. The existence and validity of process under which a prisoner is held are the proper subjects of inquiry. *Matter of Lagrave*, 45 How. 301. It is only the facts necessarily involved that will be determined. *People v. Wilcox*, 22 Barb. 186.

Precedent for Answer Traversing Return.

In the Matter of the Application of Richard
Stokes for a Writ of *Habeas Corpus*.

38 Hun, 280.

The answer of Richard Stokes to the return of the writ of *habeas corpus* heretofore made, and filed herein by George Young, sheriff of Ulster County:

The said Richard Stokes denies that the commitment returned by the said sheriff is a valid commitment, and shows that the said commitment is invalid, null, and void, for the reason that the justice alleged to have made the same had no jurisdiction to try or sentence the said Richard Stokes; and further, that the said commitment was not in fact signed by said justice, and the signature thereto is not his act or deed, nor authorized by him.

JOHN F. CLOONAN,

Attorney for Petitioner.

(Add verification as to pleading.)

Traverse.

NEW YORK SUPREME COURT.

The People *ex rel.* Morris Frey,

agst.

The Warden of the County Jail of New York
County, etc.

100 N. Y. 20.

The traverse of Martin Frey to the return made to his petition, etc., respectfully shows:

1. Your petitioner denies the statement made in said return that your petitioner's alleged enlistment was legal and in proper form, and that your petitioner was sworn in accordance with the Military Code.

2. Your petitioner further denies he was duly summoned before said court martial, and denies that he had any hearing whatsoever. That said court martial then had not and has not now any jurisdiction whatever over your petitioner.

3. Your petitioner further denies that he was duly notified to perform the duty for which the alleged neglect of which he was notified as a delinquent as alleged in said warrant referred to in the return of Captain

Art. 5. Proceedings on Return.

John W. Fleck. On the contrary, your petitioner alleges that whatever orders were sent to petitioner to attend drills, the same were not served as petitioner is informed and believes in accordance with the requirements of the Military Code, which fact was at the time well known to the captain, John W. Fleck, president of the aforesaid court martial, and which your petitioner will be able to prove on the proper trial of the issues herein.

4. Your petitioner, further traversing said return, alleges that prior to his said enlistment in said regiment your petitioner was induced to join the same on the false representations made by one of the officers thereof; that the said regiment was not governed by any law governing regular military organizations of this State, that it was merely a social body of persons joined together for social advancement, and that in case of sickness your petitioner would derive a weekly benefit of \$10 during his sickness. That petitioner, relying upon the representations so made to him as aforesaid, and believing them to be true, consented to become a member. That thereupon the petitioner became admitted, without the knowledge or consent of his father, and without being asked to obtain said consent.

That your petitioner was asked to sign a paper in petitioner's name and in the name of his father, which petitioner did without knowing the contents thereof, and which were kept concealed from petitioner's view. That said paper was not signed by petitioner at the headquarters of said regiment, but at a tailor shop in Second Avenue, near 84th Street, New York City.

5. Your petitioner begs leave to refer to the affidavit of Samuel Frey, hereto annexed, and which is made part of this traverse.

WHEREFORE, your petitioner prays that he may be discharged from imprisonment as prayed for in said petition.

MORRIS FREY.

(Add verification hereto.)

Traverse.

SUPREME COURT.

The People on the relation of LaFayette E. Pruyne,

agst.

Charles H. Walts.

122 N. Y. 238.

The said relator, LaFayette E. Pruyne, traversing the return of the writ of *habeas corpus* made herein, denies any knowledge or information sufficient to form a belief as to whether said Lyman Bigelow was largely influenced in the provisions of his said last will by bitterness of feeling against his wife, or whether the provisions thereof appointing said relator testamentary guardian of said infant was not made with a view to the actual benefit of said Tirzah G. Bigelow, but on the con-

Art. 5. Proceedings on Return.

trary to harass and annoy his wife, but was so made by him to justify his revengeful spirit ; he denies any information or knowledge sufficient to form a belief that said Malitta Bigelow has anxiety for said child or whether to that end applied to said respondent and his wife and expressed to them her wish that on her death said respondent and his wife would take said Tirzah G. Bigelow into their family as their own child, care for, educate, and bring her up as such ; or whether said Tirzah G. was by her said mother told that, after her death, she, said Tirzah G., was to become and be an inmate of the family of said respondent and his wife, or whether respondent and his wife after, at least for a year and a half, cultivated the acquaintance of said Tirzah G., so that, on the happening of the death of her mother and the taking of her into respondent's family pursuant to said request of her mother, said Tirzah G. would not be going among strangers to her ; or whether the respondent and his wife a few days before the death of the mother of said Tirzah G. Bigelow, and at the earnest expressed wish of said Malitta Bigelow, promised her in response to her dying request that they would take care of and bring up to the best of their ability the said Tirzah G. ; or whether, after the death of said Malitta Bigelow in fulfilment of said promise, being with the consent of the grandfather of said Tirzah G., respondent and his wife took said Tirzah G. into their family, or whether after and before the death of her mother the said Tirzah G. knew and understood that it was the wish and desire of her mother that she should go into respondent's family, or whether she went willingly and is contented and happy and expressed a desire to remain in the family of respondent, having apparently become strongly attached to respondent and his wife, or whether respondent and his wife have become strongly attached to her. He denies that he proposes, if awarded the custody of said Tirzah G., to put her in the family of a stranger, and he denies that to put said Tirzah G. into his custody or of those whom he may procure to take the more immediate charge of her would make the said Tirzah G. unhappy and discontented, or that it would not be for the best interest of said child or detrimental to her health. He denies that the said Lyman E. Bigelow during his last sickness expressed to the said Pruyne that his wife and child be sent for with a view of reconciliation between them, or that said Pruyne ever refused or omitted to communicate any request made by said Bigelow ; and he denies that it would be injurious to said Tirzah G. to remove her from her present home, and that she would be discontented and unhappy, or that her removal would seriously injure her health and happiness. He denies that the interests of said Pruyne under the will of said Bigelow are antagonistic to said Tirzah G., or that it would be unwise or unsafe and not for the best interest of said Tirzah G., and for the said Tirzah G. to be committed to the care and custody of said Pruyne. And he denies that he is not a proper person to have such care and custody.

He denies any information or knowledge sufficient to form a belief whether said mother selected said respondent and his wife as the persons whom she desired to take charge of, have the custody of, or take

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care, control, management, and education of said Tirzah G. after her death, and to carry out her desires and wish she secured from said respondent and his wife the promise that they would take the care of said Tirzah G., or whether said wish and desire was often stated and expressed by said Malitta a few hours before her death, or when she was dying; or whether said Malitta informed said Tirzah G. at any time that she would be the child of respondent and his wife, or whether said information by the mother to the child was frequent during the two years last past; or whether said Tirzah G. understood or became reconciled to such disposition of her upon the death of her mother, or during the time she has become acquainted with respondent and his wife, or seem to have formed a great liking and attachment for them; or whether after the death of her said mother said Tirzah G. willingly went to live with respondent; or whether she is contented and happy and expressed a wish that she shall always remain there, or whether all of the relatives of the said Tirzah G. are desirous that she shall remain where she is; or whether said Tirzah G. has expressed any dislike or fear of said relator.

LAFAYETTE E. PRUYNE.

*(Add verification hereto.)***Answer to Return.**

COURT OF OYER AND TERMINER, CITY AND COUNTY OF NEW YORK.

The People on the relation of William M.
Tweed,

agst.

Joseph L. Liscomb.

60 N. Y. 559.

The answer of William Tweed to the return of Joseph L. Liscomb made to the writ of *habeas corpus* in this case:

Said William M. Tweed says and avers:

1. That there is no record of a judgment of any court of competent jurisdiction which in terms authorizes or purports to authorize the issuing of the pretended warrant or commitment, a copy whereof is annexed to said return.

2. That there is no record of a judgment of any court of competent jurisdiction which in law or fact did or does authorize the issuing of said warrant of commitment.

3. That the court from which said warrant of commitment annexed to the said return purports to have been issued had no jurisdiction nor power to try the alleged misdemeanors mentioned in the said warrant of commitment.

4. That the pretended jury by whom this relator is alleged under said warrant to have been tried and convicted was not impanelled according to the law of the land, was not a lawful jury and had no jurisdiction or power to try the said supposed offences or to render any verdict respecting the same.

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5. That the alleged judgment in execution of which the said pretended warrant of commitment was issued was and is absolutely void for want of jurisdiction to render the same.

6. That the pretended trial and the pretended conviction were for one misdemeanor only, for which no imprisonment for more than one year and no fine greater than \$250 could be pronounced or adjudged against him, although for such imprisonment and conviction the relator has already been imprisoned for more than one year under said pretended warrant and has paid a fine of \$250.

7. That if the said one year's imprisonment is lawful, which the relator denies, each and every pretended sentence of said court whereby said relator was condemned to any further or other imprisonment or to pay any further or other fine was and is void.

8. That the term of the relator's imprisonment under the said pretended warrant of commitment has expired.

9. That the said pretended warrant of commitment does not conform to any judgment or pretended judgment of any court and is not warranted or authorized by the same.

10. That the said warrant of commitment is void for want of a specification of the offence or offences whereof it is pretended that the relator was convicted.

WILLIAM M. TWEED.

(Add verification hereto.)

Answer to Return.

SUPREME COURT. GENERAL TERM. FIFTH DEPARTMENT.

<p>The People <i>ex rel.</i> Charles Young,</p> <p style="text-align: center;"><i>agst.</i></p> <p>James C. Stout, Agent and Warden of State Prison at Auburn, N. Y.</p>	}	144 N. Y. 699.
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The relator, Charles Young, traversing the return of James C. Stout, Esq., agent and warden of the State prison at Auburn, N. Y., states that the statements and allegations made and contained in the petition for the writ of *habeas corpus* herein presented to this court was and is true, and this relator hereby reiterates and reaffirms the same as part of his answer to said return herein.

The relator further says that when he was arraigned for trial in Monroe County court of sessions he objected to the form of the indictment and also objected to being put on trial for any crime other than "assault with intent to commit murder," being the crime for which he was extradited herein from England, and that he therefore asked that he be tried only upon that charge, and that the said court thereupon in all things overruled and denied this relator's objections, and also further, when the grand jury rendered its verdict of "assault in the

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second degree" on the 10th day of April, 1894, this relator again excepted to the verdict and moved that the same be set aside on the grounds that the offence for which he had been found guilty was not one that was extraditable under the treaty between the United States and Great Britain, and the relator's objections and motion were then again in all respects denied and overruled by said court.

That therefore said court of sessions had no jurisdiction of the person of this relator for the trial of said offence of "assault in the second degree," and for which he was illegally convicted, and said conviction was and is illegal and without jurisdiction and said court had no jurisdiction to pronounce sentence thereon.

Wherefore, this relator demands that he be discharged from further imprisonment and be given a reasonable time to return to England from which he was extradited, according to the provisions of the supplemental treaty entered into between the two countries in 1889.

CHARLES YOUNG,
Relator.

(*Add verification hereto.*)

The court must under some state of facts have had jurisdiction to render the judgment given in order to prevent inquiry, and discharge of prisoner on *habeas*. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559. This must be determined by the court on the hearing. *People v. Bowe*, 58 How. 393; *People v. Oyer and Terminer*, 14 Hun, 21. Pardon is ground of discharge. *People v. Edymoin*, 8 How. 478. And the court cannot inquire whether the proceedings to obtain it were regular. The record on summary conviction may be examined. *Re Sweatman*, 1 Cow. 144; *Re Phillips*, 1 Park. Cr. 95; *People v. Martin*, id. 187. Final process is held to be reviewable when there is in fact no judgment or decree, or where the judgment or conviction is void. *Ex parte Beatty*, 12 Wend. 229; *People v. Rawson*, 61 Barb. 619; *People v. Willett*, 15 How. 210; *Matter of Divine*, 11 Abb. 90; S. C. 21 How. 80. The competency of the tribunal to render a judgment or decree, under which a person is held in custody, and the jurisdiction over him as to either matter, place, sum, or person, is the subject of inquiry before a judge or court issuing the writ, and the court is expressly required to institute an inquiry into the cause of the detention and to discharge the prisoner when there is a lack of jurisdiction on the part of the tribunal, making an order for his detention. *People ex rel. v. Warden, etc.*, 100 N. Y. 20, citing *Tweed v. Liscomb*, 60 id. 559, and *Ferguson v. Crawford*, 70 id. 257.

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The Code has made changes in the rule as to contempt on *habeas corpus*, and §§ 2016 and 2032 must be read together and the authorities applied to the changed statute.

The revisers, in their note to § 2016, as originally reported, give their understanding of the Code to be that the writ may now issue, even though the commitment was for criminal contempt, leaving the determination of the rights of the prisoner to be governed by the proof under § 2032, and in case it is a civil contempt, he may be discharged; if a criminal contempt, he must be remanded. The cases under the Revised Statutes will be found collated in Bliss' Annotated Code, under § 2032. In order to entitle one to discharge the process must be void, not voidable; defects which may be cured by amendment make process only voidable. *People ex rel. Utley v. Seaton*, 25 Hun, 305; *Benedict v. Thayer*, 20 id. 547. Section 2034 does not prevent a determination as to whether the court rendering the judgment had jurisdiction. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 760; *People ex rel. v. Warden, etc.*, 100 id. 20. But the court is not at liberty to go behind the conviction and re-try the question of fact upon which it was made. *People v. Catholic Protectory*, 38 Hun, 127, affirmed on another point, 101 N. Y. 195.

A reference cannot be ordered. *Matter of Smith*, 1 Crary's Sp. Proc. 387, as decision of Special Term by Judge Davies, it does not appear to have been reported. It is said by Mr. Hurd (p. 323) that affidavits may be read on the hearing, if properly taken and authenticated, but that their reception is a matter of discretion, and to be received cautiously; and in criminal cases only when the attendance of witnesses cannot be obtained. This view is to some extent sustained. *Matter of Heyward*, 1 Sandf. 702. The burden of proving defects in process is on the prisoner. *Id.* And if the material facts in the return are not denied they will be taken as true. 1 Park. Cr. 129. The principles laid down in *Tweed v. Liscomb*, 60 N. Y. 559, and *People ex rel. v. Warden, etc.*, 100 N. Y. 20, *supra*, will govern as to what can be inquired into and tried on this hearing, and dispose of many questions discussed in earlier cases, which are there cited.

The only inquiry that a county judge can make upon the return to a writ of *certiorari* is, as to whether it appears from the judgment itself that the inferior court had jurisdiction. *People*

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ex rel. Ryan v. Webster, 86 Hun, 73. Where it appears upon the return to the writ, that a person is detained in custody by virtue of the final judgment or decree of a competent tribunal, it is the duty of the judge to make an order remanding the prisoner to custody. *People ex rel. McLoughlin v. Wilson*, 88 Hun, 258, 68 St. Rep. 535, 34 Supp. 734, citing *People ex rel. Danziger v. Protestant Episcopal House of Mercy*, 128 N. Y. 185; *People ex rel. Lotz v. Norton*, 76 Hun, 7; *Matter of Donohue*, 1 Abb. N. C. 10; *People ex rel. Phelps v. Fancher*, 2 Hun, 226.

Where the traverse to a writ of *habeas corpus* neither disputes any fact upon which the jurisdiction of the magistrate was predicated, nor alleges extrinsic facts tending to show a want of jurisdiction on his part, to render the judgment, it is demurrable. *Peo. ex rel. Lazarus v. House of Mercy*, 23 App. Div. 383, 48 Supp. 217, 82 St. Rep. 217. A person held under the sentence of imprisonment for non-payment of a fine imposed for a violation of the Liquor Tax Law may be released on a writ of *habeas corpus*, as the court has no jurisdiction to impose such a sentence. *Peo. v. Stock*, 26 App. 564, 50 N. Y. Supp. 483, 84 St. Rep. 483.

A certificate of conviction which states that defendant was before the recorder on a certain charge of petit larceny is sufficient, although it does not specify the goods taken or state from whom they were taken. *Peo. ex rel. Hunt v. Markell*, 22 Misc. 607, 50 Supp. 766, 84 St. Rep. 766. Where there was sufficient evidence before the committing magistrate to require him to decide whether the defendant had committed an offence, his determination thereon cannot be reversed and the defendant discharged on *habeas corpus*. *Peo. ex rel. Peterson v. McFarline*, 25 App. 630, 49 Supp. 599, 83 St. Rep. 599. A judgment debtor who is on the jail limits is not entitled to be discharged on *habeas corpus*, although the judgment did not authorize an execution against his person. *Peo. ex rel. Smith v. Biggart*, 25 App. 20, 48 Supp. 1030, 82 St. Rep. 1030. A certificate of conviction which contains no mandate to the sheriff to receive and confine the prisoner, and which is not certified by the magistrate or county clerk, is insufficient to authorize his detention. *Peo. ex rel. Snider v. Whitney*, 22 Misc. 226, 49 Supp. 591, 83 St. Rep. 591.

Where a sheriff relies on a judgment of conviction as author-

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ity for detaining a prisoner, he is required to establish the fact of such judgment. *Peo. ex rel. Snider v. Whitney*, 22 Misc. 226, 49 N. E. Rep. 591, 83 St. Rep. 591. Upon the return to a writ of *habeas corpus*, the court may inquire into the constitutionality of the statute under which the judgment was rendered, for it is without authority, and not the judgment of a competent tribunal, if based upon an unconstitutional statute. *Matter of Kemler*, 7 Supp. 145. It is the duty of the judge, upon hearing a return to a writ of *habeas corpus*, to inquire into the jurisdiction of the tribunal which rendered the judgment or decree, and to discharge the prisoner where it appears there was a lack of jurisdiction over the person or subject-matter. *People ex rel. Sabold v. Webb*, 5 Supp. 835, 23 St. Rep. 335. It is the duty of a court or judge issuing the writ upon a hearing on return thereto, where it appears the prisoner is held in custody under a judgment or decree, to inquire into the jurisdiction of the tribunal to render the judgment or decree, and to discharge the prisoner where it appears there was a lack of jurisdiction over the person or subject-matter. Courts martial and delinquency courts being courts of limited jurisdiction, judgments pronounced by them when questioned in any collateral proceeding are of no force or effect as establishing a right to enforce them unless accompanied by proof of the jurisdictional facts upon which the authority of the court to render them depends. The recital of jurisdictional facts in such case is not even *prima facie* evidence of their existence. *People ex rel. Frey v. The Warden, etc.*, 100 N. Y. 20.

Upon a return to a writ of *habeas corpus*, where it is shown that the relator has been sentenced, and is detained under the process of a court of competent jurisdiction, it is the duty of the court to remand him, unless it be shown the trial court was without jurisdiction to pass the sentence. *People ex rel. Kemler v. Durston*, 119 N. Y. 570, affirming 55 Hun, 64. A person under sentence of fine and imprisonment imposed by a court of sessions cannot be discharged on *habeas corpus* on the ground that the court of sessions exceeded its powers in imposing the fine where the court had power to imprison but the term of imprisonment had not expired. *People ex rel. O'Brien v. Woodworth*, 78 Hun, 586, 29 Supp. 211, 60 St. Rep. 787. Where it appears that the relator is detained for a criminal con-

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tempt specially and plainly charged in the commitment made by a court having authority to commit for contempt, so charged, he must be remanded. *People ex rel. Taylor v. Seaman*, 8 Misc. 152, 59 St. Rep. 462, 29 Supp. 329.

On the filing of a traverse to a return to a writ of *habeas corpus*, the return is to be assumed to be true, except in so far as its material allegation is controverted by the traverse. The provision requiring the court or judge before whom the prisoner is brought to proceed in a summary way to hear the evidence has no application unless the material allegations showing jurisdiction are controverted by a proper traverse. *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180, 40 St. Rep. 160, reversing 59 Hun, 624, and 13 Supp. 401. In *People ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 208, on *habeas corpus*, it was held that the commitment of a female to a reformatory institution by a police justice had all the force and effect of a final judgment of a court of competent jurisdiction under the provisions of the Code regulating the procedure in *habeas corpus* cases. Proceeding by *habeas corpus* is summary in its nature, and denials of the allegations of the return made to the writ may be made in an informal manner by affidavits, or even orally. Where an issue was raised by a traverse and by affidavit as to the fitness of the present custodian of the child, the court may properly send the question to a referee with directions to take testimony and report thereon. *People ex rel. Keator v. Moss*, 6 App. Div. 414. One whose conviction is valid will not be released on *habeas corpus* though the commitment was erroneous, if such judgment was incorporated in the commitment. *People ex rel. Peck v. Schantz*, 13 Misc. 563, 34 Supp. 1099.

Under the provisions of the Code of Criminal Procedure, providing that a magistrate can commit a person to answer for a crime only when it appears that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, some evidence of defendant's guilt is necessary to give the magistrate jurisdiction, and therefore on *habeas corpus* the court may go behind the commitment and ascertain whether there was any evidence before the committing magistrate which connected defendant with the crime. *In re Henry*, 13 Misc. 734, 35 Supp. 210, 69 St. Rep. 590. When a return to a writ contained the commitment and a copy of the complaint, and a traverse was

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interposed denying that the petitioner was examined or any evidence taken, an issue of fact is made up, and the case should be heard on the evidence. *In re Simon*, 59 Hun, 624, 13 Supp. 399. Under § 2036 it is expressly provided that where a prisoner is not entitled to his discharge, he must be remanded to the custody from which he was taken, unless the person in whose custody he was is not lawfully entitled thereto; in which case the order remanding him must commit him to the custody of the officer or person so entitled. *People ex rel. Post v. Grant*, 50 Hun, 243, 3 Supp. 143, 20 St. Rep. 48.

Where objection is made to a return, it seems a further return by the sheriff may be made showing the facts, or the judge may take oral evidence to ascertain them. *People ex rel. Clark v. Grant*, 111 N. Y. 584, affirming 47 Hun, 605.

Where a demurrer was interposed to the return of the sheriff to a writ of *habeas corpus*, and the case decided on the demurrer, it was held proper to tax a trial fee of \$20 as upon a trial of an issue of law, and not proper to tax costs before notice of trial on the demurrer strictly speaking. *In re Bernhard*, 1 Supp. 225, 14 Civ. Pro. 195, 48 Hun, 620.

The plain implication of § 2039 is that the return is assumed to be true, except in so far that its material allegations are controverted by the traverse, and that portion which requires the court or judge before whom the prisoner is tried, to proceed in a summary way to hear the evidence, has no application unless the material allegations showing jurisdiction are controverted by the traverse. *Peo. ex rel. Dansiger v. P. E. House of Mercy*, 128 N. Y. 187. In the case of *Peo. ex rel. Keator v. Moss*, 6 App. 417, the court says: "Proceedings in these cases are not governed by the strict rules of pleading which are applicable to civil actions. They are summary in their nature, and the only requirement is that there shall be presented to the court or judge some facts or allegations in such a way that he may know that the allegations of the return are denied. The statute does not say that such denials or allegations must be by way of formal traverse, although as a matter of practice they are made by a traverse to the return, but they may be made by affidavit, or they may even be made orally. The statute does not prescribe any manner in which the return shall be denied."

The judge before whom the prisoner is produced must immedi-

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ately examine the facts alleged in the return, and into the cause of the imprisonment, and discharge or remand him as the case may require, *People ex rel. James v. Society for the Prevention of Cruelty to Children*, 19 Misc. 678. If a party is held under a judgment when there was no jurisdiction to pronounce the same, through either want of jurisdiction or through excess thereof, the judgment is void and he may be released on *habeas corpus* without being put to an appeal from the judgment. *People ex rel. Young v. Stout*, 81 Hun, 341. In *habeas corpus*, when it appears that the person is in custody under a commitment by the magistrate, the only inquiry is, as to whether the magistrate has jurisdiction, and the magistrate's decision cannot be reviewed; hence it is not essential to return the evidence on the trial. *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 182. If the process by which the prisoner is held is valid on its face, the burden of impeaching its validity rests upon the prisoner upon appeal. On *habeas corpus* only two questions can be examined: first, as to the jurisdiction of the court or officer making the commitment; second, as to the form of commitment. The court has no power to inquire into the justice or propriety of the commitment, nor can the Supreme Court review upon *certiorari* the judgment of a court ordering commitment for contempt. *Matter of Taylor*, 8 Misc. 168.

The test of a right to *habeas corpus* is whether the tribunal was competent, by reason of its criminal or civil jurisdiction, to render the judgment by virtue of which the person is held; therefore relief from imprisonment on execution in the justices' court, in an action for the violation of the Excise Law, cannot be had by *habeas corpus*, on the grounds that the justice had no proof of a delivery of the summons properly indorsed, or that he had lost jurisdiction by improper adjournment, or because the costs were excessive if the justice would have had jurisdiction to render the judgment that he did render. *People ex rel. Martin v. Walters*, 15 Abb. N. C. 462. Where it appears by the return to the writ, that the prisoner is detained by virtue of the final judgment or decree of a competent tribunal, it is the duty of the judge to make an order remanding the prisoner to custody. *People ex rel. McLoughlin v. Wilson*, 88 Hun, 260. Where the judgment of a court of record is void, by reason of a lack of power to impose the punishment given, the prisoner

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may be remanded for re-sentence, and the record corrected ; but where such improper sentence was given in a court of special sessions, the prisoner cannot be remanded for the further action of the court, for it has ceased to exist for the purpose of the case, when the judgment was pronounced. A conviction which imprisons a person for a period not exceeding 80 days is void, being indefinite. *People ex rel. Johnson v. Webster*, 92 Hun, 379.

A traverse is demurrable when it does not dispute the facts showing the jurisdiction of the magistrate, nor allege extrinsic facts showing a want of jurisdiction. *People ex rel. Lazarus v. House of Mercy*, 23 App. Div. 386.

Where a person has been found guilty of charges by a delinquency court under the Military Code, the court upon the *habeas corpus* will not inquire into the legality or justice of the order of the delinquency court, and if there be an error in its exercise of jurisdiction, the remedy is by *certiorari* or appeal. *People ex rel. Patterson v. Reid*, 64 Hun, 454. Where one is held on an order adjudging him guilty of contempt, he will be discharged on *habeas corpus* ; first, where the punishment exceeded that which the court was authorized to inflict by § 9, Code Civ. Pro. ; or second, if it be assumed that he is held under the Code provisions for the punishment for a civil contempt and where there is no adjudication that the conduct complained of was calculated to, or did actually, impede, impair, or prejudice the rights and remedies of the petitioner. *Matter of Swenarton v. Shupe*, 40 Hun, 42.

Where a person is committed for a contempt, and where the objection that the sheriff had no power to imprison the prisoner in that particular county, as commanded by the commitment, might be well taken, yet, in such case the court may make an order remanding him to the custody of the officer lawfully entitled thereto. *People ex rel. Post v. Grant*, 50 Hun, 246.

Costs, while not allowed in *habeas corpus* proceedings of a criminal nature, may be awarded in the discretion of the court in a civil proceeding of that nature, and where such a charge is made against a party in a final order, the circumstances which determine the sum charged should clearly appear before the court by which the order is made. *Matter of Teese*, 32 App. Div. 46, citing *Bickford v. Searles*, 9 App. 151.

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Order Discharging Prisoner.

In the Matter of the Application of Richard Stokes for a Writ of <i>Habeas Corpus</i> .	} 38 Hun, 280.
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Whereas, a writ of *habeas corpus* has been heretofore issued on the application of Richard Stokes to the sheriff of Ulster County, commanding him to bring up the body of said Stokes for the purpose of inquiry into the cause of his detention, and the said prisoner having been brought before me and an examination had, and it appearing on such examination that the said Richard Stokes is unlawfully imprisoned and restrained of his liberty by reason of want of jurisdiction on the part of the court of special sessions at which he was tried: Now, after hearing John F. Cloonan on behalf of the prisoner, and J. N. Vanderlyn, district attorney, opposed — it is, therefore, finally ordered that the said Richard Stokes be and hereby is forthwith discharged from the custody of the sheriff of Ulster County, and from further imprisonment under and by virtue of the commitment of the court of special sessions, made herein by F. D. L. Montanye, Esq., by which he was held by said sheriff.

WILLIAM S. KENYON,

Dated May 2, 1887.

County Judge of Ulster County.

Order Remanding Petitioner.

NEW YORK SUPREME COURT.

In the Matter of the Application of Frederick L. Taylor for a Writ of <i>Habeas Corpus</i> .	} 143 N. Y. 219.
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It appearing on the return of the writ of *habeas corpus* allowed by me, that Frederick L. Taylor, upon whose petition the said writ was issued, is lawfully detained by the sheriff of Tompkins County by virtue of a mandate of the Court of Oyer and Terminer, committing said Frederick L. Taylor to the custody of the sheriff of Tompkins County for a criminal contempt committed in the presence and in the view of said court, a copy of which said mandate is annexed, to the return of said sheriff and made a part thereof, and which criminal contempt for which the said Frederick L. Taylor was committed to the custody of the sheriff of Tompkins County as aforesaid, is specially and plainly charged in said mandate:

And it further appearing that said Court of Oyer and Terminer had full jurisdiction and authority to charge and commit for contempt, and that the said Frederick L. Taylor is not entitled to be bailed:

I do hereby finally order that all the proceedings in this matter be

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and the same hereby are dismissed and the prisoner remanded to the custody of the sheriff of Tompkins County.

Dated, March 26th, 1894.

WALTER LLOYD SMITH,
J. S. C.

Order Dismissing Writ.

At a Special Term of the Supreme Court of the State of New York, held at the court-house in the city of New York on the 31st day of July, 1884.

Present :—Hon. Abraham R. Lawrence, *Justice*.

The People *ex rel.* Morris Frey

agst.

The Warden of the County Jail of the County
of New York and the 11th Regiment, N. G. S.
N. Y.

100 N. Y. 20.

Upon the petition for a writ of *habeas corpus* herein filed, and the writ of *habeas corpus* thereon issued and upon the return thereto, also filed, and the proceedings had before the court martial, etc., and after hearing Isaac L. Sink, Esq., attorney for relator for the motion to discharge relator, and Horatio C. King, Esq., Judge Advocate General, etc., in opposition thereto :

It is ordered that said writ of *habeas corpus* be and the same is hereby dismissed, and the relator Morris Frey is hereby remanded back to the custody of the warden of the county jail of the county of New York.

It is further ordered, that Isaac L. Sink, Esq., the attorney for the relator, in whose custody the relator was placed pending the decision of this application, surrender the said Morris Frey to the warden of the county jail of New York County within 48 hours after the service of a duly certified copy of this order upon him.

PATRICK KEENAN,
Clerk.

Order Dismissing Writ.

SUPREME COURT.

In the Matter of the Application of Lafayette
E. Pruyne as guardian of the person and es-
tate of Tirzah G. Bigelow and infant for the
custody of said infant.

122 N. Y. 238.

A writ of *habeas corpus* having been issued and allowed by the Hon. George N. Kennedy, one of the justices of the Supreme Court, February 15th, 1887, directed to Charles H. Walts, commanding him to produce before said justice at the court-house in the city of Watertown

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on the 13th day of February, then instant, the body of Tirzah G. Bigelow, together with said writ, which was issued and allowed upon the written petition of LaFayette E. Pruyn, verified February 4th, 1887, setting forth that said Tirzah G. Bigelow, among other things, is an infant about eight years of age, the only child of LaFayette E. Bigelow, deceased, who died in August, 1884, leaving a last will and testament, which has been duly probated in the surrogate's court of Jefferson County, N. Y., wherein and whereby he, said Pruyn, was appointed testamentary guardian of said infant during her minority; that letters of said guardianship had been issued to him by the surrogate of said county; that the mother of said infant died in December, 1886, and that said infant was detained, imprisoned, and restrained of her liberty by said Charles H. Walts, illegally and under claim that an arrangement was made between him and the mother of said infant in her lifetime, whereby said Walts, neither relative nor guardian of her, should have the care and custody of said infant.

And in obedience to said writ said Walts having produced said infant and writ, and made and filed his verified return thereto, setting forth, among other things, an agreement between him and the mother of said infant whereby it was agreed that he should take and have the care and custody of said infant and of her education during her minority, and that said infant was and since the death of her mother had been under his care and that of his wife in his family, where said infant was attended and well cared for and much attached to himself and his wife, both of whom wish to retain said child and have the care and custody of her, and are so situated and have the ability properly to do so, and have; and said petitioner having filed a traverse of some of the allegations contained in said return, and the hearing thereon having been continued to the 23d day of February, aforesaid, at the same place, when a hearing of the evidence on the part of the respective parties was had, and after hearing counsel of both parties and duly considered the proofs, said justice made his decision in writing, directing, for the reason therein contained, that said writ be dismissed without prejudice to further proceedings:

Now, on reading and filing said decision, it is, on motion of Levi H. Brown, attorney for said Charles H. Walts,

Ordered, that said writ of *habeas corpus* and all proceeding therein be and the same are dismissed without prejudice to future proceedings, and that said Tirzah G. Bigelow be allowed to remain in the care and custody of said Charles H. Walts until the future order of this court in the premises.

Let this order and the papers used thereon be entered and filed in Jefferson County.

A copy:

F. WADDINGTON,
Clerk.

GEORGE N. KENNEDY,
J. S. C.

Art. 5. Proceedings on Return.

Order of Discharge. (144 N. Y. 699.)

At a General Term of the Supreme Court of the State of New York in and for the Fifth Judicial Department, held at the court-room in the city of Rochester, Monroe County, on the 21st day of October, 1894.

Present :—Hon. Charles C. Dwight, *Presiding Justice*.

Hon. Loran L. Lewis,
Hon. Albert Haight,
Hon. George E. Bradley, } *Associate Justices*.

The People of the State of New York *ex rel.*
Charles Young,

agst.

James C. Stout, Agent and Warden of State
Prison at Auburn, N. Y.

Decision and order filed February 13, 1894.

Whereas, a writ of *habeas corpus* has been duly heretofore issued by the aforesaid General Term on the application of William H. Sullivan, one of the attorneys of the above-named relator, to James C. Stout, Esq., agent and warden of the State prison at Auburn, N. Y., commanding him to bring up the body of the above-named relator, Charles Young, for the purpose of inquiring into the cause of his detention, and the said Young having been personally brought before this court, and an examination had, and it appearing on such examination that the said Young is unlawfully imprisoned or restrained of his liberty by reason of the commitment of the said Young by the Monroe County court of sessions on July 16, 1894, under which said Young is restrained of his liberty, be illegal and void and in violation of the terms of the treaty and supplemental treaty between the United States of America, and her Britannic Majesty, the Queen of the United Kingdom of Great Britain and Ireland, and the district attorneys of Cayuga County and of Monroe County having been duly notified of the hearing in this matter pursuant to an order of this General Term, directing said writ to issue, and proof of such notice having been filed, and the aforesaid State agent having directed the sheriff of Monroe County to take into his custody the person of the said relator and keep him confined in the Monroe County jail in Rochester, N. Y., until a final determination in the aforesaid proceeding or matter and until the further order of this court and General Term in the premises.

Now, after hearing Messrs. H. J. & W. H. Sullivan on behalf of the relator and prisoner, Charles Young, in favor of his discharge, and Howard H. Widener, Esq., assistant district attorney of Monroe County, and Messrs. Rich & Aiken, attorneys and counsel for said district attorney and the above-named defendant,

It is ordered, that said Charles Young be and he is hereby forthwith discharged from the custody of John W. Hannan, Esq., sheriff of the

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county of Monroe, and from the jail of said county and from the custody of James C. Stout, Esq., agent and warden of State prison at Auburn, N. Y., and from said prison, and from further imprisonment under and by virtue of the commitment of the court of sessions held in and for the county of Monroe on the 16th day of July, 1894, by which the said Young was held by the aforesaid defendant, James C. Stout, Esq., agent and warden aforesaid, in said State prison, and that the said sheriff be and he hereby is directed to discharge the said Young from his custody at the end of five days from the date of service of a copy of this order upon the district attorney of Monroe County,

K. P. SHEDD,
Clerk.

ARTICLE VI.

PROCEEDINGS WHEN PRISONER DISCHARGED AND EFFECT OF DISCHARGE. §§ 2048, 2049, 2050.

§ 2048. Order substituted for writ of discharge; service and effect thereof.

The writ of discharge is abolished. A final order to discharge a prisoner, made as prescribed in this article, may be served in like manner as an injunction order, and when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made in this act. Where such an order directs a discharge, upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law showing that bail has been given, as required thereby.

See §§ 610 and 1241.

§ 2049. Enforcing order for discharge; penalty, etc.

Obedience to a final order to discharge a prisoner, made as prescribed in this article, may be enforced by the court which, or the judge who made the same by attachment, as for a neglect to make a return to a writ of *habeas corpus*, and with like effect. A person guilty of such disobedience forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars, in addition to the damages which the latter sustains.

Section 57, R. S., am'd. See §§ 2020 and 2051.

§ 2050. When prisoner discharged not to be re-imprisoned; when he may be.

A prisoner, who has been discharged by a final order, made upon a writ of *habeas corpus* or *certiorari*, issued as prescribed in this article, shall not be again imprisoned, restrained, or kept in custody, for the same cause. But it is not deemed to be the same cause, in either of the following cases:

1. Where he has been discharged from a commitment on a criminal charge; and is afterwards committed for the same offence, by the lawful order or other mandate of the court, wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offence.

2. Where he has been discharged, in a criminal cause, for defect of proof, or for a material defect in the commitment; and is afterwards arrested on sufficient proof, and committed by a lawful mandate for the same offence.

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3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order or other mandate, as prescribed in this article ; and is afterwards imprisoned by virtue of a lawful judgment, final order, or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest ; and is afterwards taken in execution, or other final process, in the same action or special proceeding, or arrested, in another action or special proceeding, after the first was discontinued.

If the officer has no jurisdiction the order made on the writ is void and the prisoner may be re-arrested. *Spalding v. People*, 7 Hill, 301 ; *Cable v. Cooper*, 15 Johns. 152. It is held if the order is valid and the prisoner is re-arrested he may again have the writ. *People ex rel. v. Kelly*, 1 Abb. (N. S.) 432. There is no principle upon which, after an imprisonment has been adjudged to be illegal, a party can be restrained of his liberty without some new legal process so long as the judgment stands. *People ex rel. Young v. Stout*, 10 Misc. 247, 63 St. Rep. 862, 31 Supp. 421. Where a husband was arrested and imprisoned under a commitment for contempt for failure to pay alimony, and afterward another commitment was issued against him for the same cause, and again because the two preceding commitments were irregular and defective, a third commitment was issued, from arrest, under none of which had he been discharged by the court, although he applied by *habeas corpus* for his discharge from arrest, under the two first commitments, but said two first commitments were countermanded by the plaintiff therein, it was held, that he could not obtain his release under *habeas corpus*, and it seems he could not secure his discharge on this ground, even if he had been discharged from imprisonment under the two first commitments, if such discharge was made on the ground of the illegality of the commitments. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 183, 47 Hun, 605, 111 N. Y. 584.

Where one has been discharged from imprisonment under a commitment to await the action of the grand jury, an action for malicious prosecution cannot be maintained before the grand jury has considered the case, because by the force of § 2050 such a commitment does not prevent a subsequent imprisonment for the same cause, and an action for malicious prosecution cannot be maintained until the proceeding complained of has been legally terminated in favor of the accused. *Hincs v. Parker*, 11 App. 329.

 Art. 7. Proceedings when Prisoner Entitled to Bail.

ARTICLE VII.

 PROCEEDINGS WHEN PRISONER ENTITLED TO BAIL. §§ 2035,
2045, 2046, 2047.

§ 2035. Proceedings on irregular commitment.

If it appears that the prisoner has been legally committed for a criminal offence, or if he appears by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offence, although the commitment is irregular, the court or judge, before which or whom he is brought, must forthwith make a final order, to discharge him upon his giving bail, if the case is bailable; or, if it is not bailable, to remand him. Where bail is given pursuant to an order, made as prescribed in this section, the proceedings are the same as upon the return to a writ of *certiorari*, where it appears that the prisoner is entitled to be bailed.

§ 2045. Bail on certiorari; when and how ordered.

If, upon the return to a writ of *certiorari*, issued as prescribed in this article, it appears, that the person imprisoned or detained is entitled to be bailed, the court or judge must make a final order, fixing the sum in which he is to be admitted to bail; specifying the court, and the term thereof, at which he is required to appear; and directing his discharge, upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it; otherwise, bail may be given afterwards, as prescribed in the next section.

§ 2046. [Am'd, 1895.] Id.; by whom and how taken.

Upon the production of the order, or, if it was made by a court, of a certified copy thereof, to a justice of the Supreme Court, or to the county judge or special county judge of the county, where the prisoner is detained, the judge must take the recognizance of the prisoner, with two sureties, in the sum so fixed, conditioned for the appearance of the prisoner, as prescribed in the order. Each person, offering himself as a surety, must show, by his oath, to the satisfaction of the judge, that he is a householder in the county, and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary, that the prisoner should appear in person before the judge, to acknowledge the recognizance; but it may be acknowledged by the prisoner, and certified, in like manner as a deed to be recorded in the county.

§ 2047. Discharge of prisoner bailed.

The judge must immediately file the recognizance with the clerk of the court, before which the prisoner is bound to appear. He must also make a certificate upon the order, or the certified copy thereof, to the effect that it has been complied with. Upon production of the certificate, the prisoner is entitled to his discharge from imprisonment, for any cause stated in the return to the *certiorari*.

Section 2035 applies where a party has been committed. *Matter of Gorsline*, 21 How. 85. Unless it appears that the court in a county to which a prisoner under arrest is being carried is not in session. *People v. Cleas*, 77 N. Y. 39. The finding of an unauthorized inquest is not sufficient to hold a prisoner on *habeas*. *People v. Bridge*, 4 Park. Cr. 519. Proof of guilt must be made

Art. 8. When Warrant or Warrant of Attachment Issues.

at the hearing on the return and not afterward. *Matter of Heyward*, 1 Sandf. 701. If a military tribunal has no jurisdiction on hearing of the writ, a prisoner will be turned over to the civil authorities. *Matter of Martin*, 45 Barb. 142.

A relator on *habeas corpus* who is remanded to custody on a bench warrant, and desires a stay pending an appeal to the Court of Appeals, must himself personally execute the recognizance within the jurisdiction of the court. *People ex rel. Sherwin v. Mead*, 64 How. 252.

Precedent for Order to Admit to Bail.

In the Matter of the Application of Richard
Stokes for a writ of *habeas corpus*.

38 Hun, 280.

The above-named petitioner, having sued out a writ of *habeas corpus*, and writ of *certiorari* to review detention, and a return thereto having been made, and such return having been traversed by the said petitioner and a hearing having this day been had, and it appearing that the said Richard Stokes is entitled to be admitted to bail: Now, after hearing John F. Cloonan for the petitioner, and J. N. Vanderlyn, Esq., opposed, it is ordered that the said Richard Stokes be discharged from imprisonment on his entering into a recognizance, with two sufficient sureties, to the people of the State of New York, to appear at the next court of sessions to be held in and for the county of Ulster, at the courthouse in the city of Kingston, on the 10th day of June next, and not to depart the court without leave, and to abide the judgment and order of the court.

Dated May 2, 1887.

WILLIAM S. KENYON,

County Judge.

ARTICLE VIII.

WHEN WARRANT OR WARRANT OF ATTACHMENT ISSUES.

§§ 2054-2057, 2028-2030.

§ 2054. Warrant to bring up prisoner about being removed.

Where it appears, by proof satisfactory to a court or judge, authorized to grant either writ, that a person is held in unlawful confinement or custody, and that there is a good reason to believe, that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus* or a writ of *certiorari*; the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein; and commanding him to take, and forthwith to bring before the court or

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judge, the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge it must be under his hand.

§ 2055. When offender to be arrested.

Where the proof, specified in the last section, is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offence, committed in taking or detaining him, the warrant must also contain a direction to arrest that person, for the offence.

§ 2056. Execution of warrant; proceedings to relieve prisoner.

The officer or other person, to whom the warrant is directed and delivered, must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of *habeas corpus* had been issued in the first instance.

§ 2057. Id.; proceedings to punish offender.

If the person, having the prisoner in his custody, is brought before the court or judge, as for a criminal offence, he is entitled to be examined, and must be committed, bailed, or discharged, by the court or judge, as in any criminal case of the same nature.

§ 2028. Proceedings on disobedience of writ.

Where a person, who has been duly served with either writ, refuses or neglects, without sufficient cause shown by him, fully to obey it, as prescribed in the last two sections, the court or judge, before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant of attachment, directed generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant, and designated therein; commanding such officer or other person forthwith to apprehend the delinquent, and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made, committing him to close custody in the jail of the county in which the court or judge is; or, if he is a sheriff, in the jail of a county, other than his own designated in the order; and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed, until he makes return to the writ, and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.

§ 2029. Id.; precept to bring up prisoner.

The court or judge may also, in its or his discretion, at the time when the warrant or attachment is issued, or afterwards, issue a precept to the sheriff, coroner, or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept, until discharged, bailed, or remanded, as the court or judge directs.

2 R. S. 563, § 36.

§ 2030. Id.; power of county may be called.

The sheriff, coroner, or other person, to whom a warrant of attachment or precept is directed, as prescribed in either of the last two sections, may, in the execution thereof, call to his aid the power of the county, as the sheriff may do, in the execution of a mandate issued from a court of record.

 Art. 8. When Warrant or Warrant of Attachment Issues.

In *People ex rel. Navagh v. Frink*, 41 Hun, 188, the question is discussed as to when a warrant of arrest may issue under § 2054 and when an offender may be punished under § 2057, in case of persons unlawfully confining a child; also the question as to when prisoner must be brought before the justice issuing the warrant, as well as when notice must be given to the district attorney.

It is held in a number of cases that the principle of *res adjudicata* applies to the writ. *People v. Burtnett*, 13 Abb. 8; *People v. Orser*, 12 How. 550; *Matter of Thomas*, 10 Abb. (N. S.) 114. And that it matters not that the relator is different if the same question is up for decision between the same parties. *Matter of Da Costa*, 1 Park. Cr. 129. But see *People v. Brady*, 56 N. Y. 182, which holds the contrary, and is now the rule in this State.

Where it appears that a child is unlawfully held in confinement in a manner sufficient to constitute the offence of kidnapping, and where there is good reasons to believe that the child will be carried out of the State before it can be relieved by *habeas corpus*, the issuing of a warrant is justified under § 2054. *Peo. ex rel. Navagh v. Frink*, 41 Hun, 191.

Precedent for Petition for Warrant to Bring up Prisoner.

SUPREME COURT.

In the Matter of the Application of Alonzo Freeman for a writ of <i>certiorari</i> to bring up the body of Henry Freeman, an infant.	}
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The petition of Alonzo Freeman shows to the court that heretofore on his application a writ of *habeas corpus* issued out of this court, commanding Celia Freeman to bring up the body of Henry Freeman, an infant; that service of such process was duly made, and that Celia Freeman threatens to leave the State of New York, and remove permanently with said Henry Freeman to the State of Connecticut. That said Celia Freeman obtained the custody of the said infant by forcibly taking him from the custody of his grandmother, and committed an assault in so doing. That she has informed several persons of her intention to leave the State, and has made preparations for her departure before the return day of said writ, and this petitioner has good reason to believe that she will remove said infant from the State before such return day. Wherefore your petitioner prays that a warrant issue pursuant to the provisions of § 2054 of the Code of Civil Procedure, to bring up the said Henry Freeman before this court to be dealt with according to law.

ALONZO FREEMAN.

(Add verification.)

 Art. 8. When Warrant or Warrant of Attachment Issues.

Precedent for Warrant.

The People of the State of New York, to the Sheriff of the County of Ulster :

It appearing by the petition of Alonzo Freeman this day read and filed, that there is good reason to believe that Celia Freeman is about to remove the body of Henry Freeman, an infant, to the State of Connecticut, and out of the State of New York, before the return day of a writ of *habeas corpus* heretofore issued out of this court, commanding said Celia Freeman to bring up the said Henry Freeman: We do, therefore, command you to bring forthwith before this court the body of the said Henry Freeman, to be dealt with according to law, and also the body of the said Celia Freeman.

In witness whereof I have hereunto set my hand and caused the
[L. s.] seal of the court to be affixed.

A. B. PARKER,
Justice Supreme Court.

See *People v. Frink*, 4 State Rep. 162 ; s. c. 41 Hun, 188.

Precedent for Warrant of Attachment for Disobedience to Writ.

The People of the State of New York, to the Sheriff of the County of Ulster, in the State of New York :

WHEREAS, On the 20th day of December, 1885, a writ of *habeas corpus* was issued out of the Supreme Court, directed to Celia Freeman, commanding her to have the body of Henry Freeman before the Special Term of said court, to be held at the court-house in the city of Kingston, on the 28th day of December, 1885, then to do and receive what should be then and there considered ; and

WHEREAS, It appears by the affidavit of Thomas B. Johnson, filed this day, that service of such writ was duly made on said Celia Freeman on the 20th day of December, 1885 ; and,

WHEREAS, The said Celia Freeman has neglected, without sufficient cause shown by her, to obey said writ as prescribed by law, in that she has not appeared in said court in obedience to said writ, nor produced the body of said Henry Freeman, nor made return to said writ: You are therefore commanded to forthwith arrest, and apprehend the said Celia Freeman, and bring her before the Supreme Court, at a special term thereof, to be held at the court-house in the city of Albany, on the 12th day of January, 1886, at the opening of the court on that day, then and there to be dealt with according to law, and let this be your warrant.

Witness, Hon. Alton B. Parker, justice of the Supreme Court,
[L. s.] at the court-house in Kingston, this 28th day of December,
1885.

S. T. HULL,

J. D. WURTS,
Clerk.

Attorney for Petitioner.

Indorsed : -- " Granted this 28th day of December, 1885, on application of Alonzo Freeman.

A. B. PARKER,
"Justice Supreme Court."

 Art. 8. When Warrant or Warrant of Attachment Issues.

Precedent for Commitment.

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, on the 12th day of January, 1886:

Present:—Hon. Alton B. Parker, *Justice*.

SUPREME COURT.

In the Matter of the Application of Alonzo Freeman for a writ of <i>habeas corpus</i> to inquire into the cause of the detention of Henry Freeman, an infant.

WHEREAS, On the 20th day of December, 1885, a writ of *habeas corpus* was issued out of this court, commanding Celia Freeman to produce the body of Henry Freeman, an infant, before a Special Term of this court, to be held at the court-house in Kingston, on the 28th day of December, 1885, and on that day due proof of service of such writ was made on said Celia Freeman, and she neglected to appear or make return to said writ or produce the body of said Henry Freeman; and

WHEREAS, A warrant of attachment was issued commanding the sheriff of the county of Ulster to arrest and apprehend the said Celia Freeman, and bring her before this court at this term thereof; and

Whereas, The said Celia Freeman has been brought before the court as in said warrant of attachment commanded, and no sufficient cause has been shown for such neglect to produce the body of said Henry Freeman, as by said writ commanded, but said Celia Freeman still refuses to comply with the direction in said writ contained: Now on motion of S. T. Hull, Esq., attorney for petitioner,

It is ordered, that the said Celia Freeman be committed to close custody in the county jail of the county of Ulster, and without the liberties of said jail, there to stay and stand committed until she makes return to said writ and fully obeys the same, and complies with order which may be made by the court in relation to the person of said Henry Freeman.

A. B. PARKER,
Justice Supreme Court.

Precedent for Precept to bring up Prisoner on Disobedience to Writ.

The People of the State of New York, to the Sheriff of the County of Ulster:

WHEREAS, A writ of *habeas corpus* was heretofore issued and served commanding Celia Freeman to bring the body of Henry Freeman before this court at a term thereon specified, and she neglected so to do, and failed to make return to said writ; and

WHEREAS, A warrant of attachment was, therefore, issued to the sheriff of Ulster County, commanding him to bring the said Celia

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Freeman before the court at this term thereof, to be dealt with according to law; and

WHEREAS, The said Celia Freeman has this day been brought before the court and failed to show sufficient cause for her neglect and disobedience of the writ, and still refuses to comply with the command thereof: Now on motion of S. T. Hull, attorney for petitioner,

We do, therefore, command you forthwith to bring the said Henry Freeman, before this court, to remain in your custody till discharged or remanded, as may hereafter be directed, and this shall be your warrant.

Witness, Hon. A. B. Parker, justice of the Supreme Court, this
[L. s.] 12th day of January, 1886.

J. D. WURTS,
Clerk.

Indorsed:—"Granted this 12th day of January, 1886, on application of Alonzo Freeman.

A. B. PARKER,
Justice Supreme Court."

ARTICLE IX.

CERTIORARI TO INQUIRE INTO CAUSE OF DETENTION.

§§ 2022, 2041, 2042, 2043.

§ 2022. [Am'd, 1895.] Form of writ of certiorari.

The writ of *certiorari*, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,
To the Sheriff of," etc. (or "to A. B.")

"We command you, that you certify fully and at large, to———", ("the Supreme Court, at a Special Term or term of the appellate division thereof, to be held", or "E. F., justice of the Supreme Court", or otherwise, as the case may be,) "at ———, on ———", [or "immediately after the receipt of this writ",] "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ".

"Witness, ———, one of the justices", (or "judges") "of the said court", (or "county judge", or otherwise, as the case may be,) "the ——— day of ———, in the year eighteen hundred and ———."

§ 2041. When certiorari to issue on application for habeas corpus.

Where an application is made for a writ of *habeas corpus*, as prescribed in this article, and it appears to the court or judge, upon the petition and the documents annexed thereto, that the cause or offence, for which the party is imprisoned or detained, is not bailable, a writ of *certiorari* may be granted, instead of a writ of *habeas corpus*, as if the application had been made for the former writ.

§ 2042. Proceedings upon its return.

Upon the return to such a writ of *certiorari*, the court or judge, before which or whom it is returnable, must proceed as upon a return to a writ of *habeas corpus*, and must hear the proofs of the parties, in support of and against the return.

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§ 2043. *Id.*; when discharge to be granted; when proceedings to cease.

If it appears, that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings.

The use of the writ of *certiorari* is to enable the proceeding to continue without the presence of the prisoner, and the form of the writ is given by and under § 2022. The proceedings are the same as under the writ of *habeas corpus*.

The writ of *certiorari* to inquire into the cause of detention is not in its nature essentially a writ of review. The writ is directed to the sheriff or the person having the prisoner in custody. He is required to return to the judge issuing the writ, by what right he holds the custody of the person detained. Upon this requirement he returns simply the commitment. He has not possession of the evidence upon which the commitment was granted. He cannot certify any such evidence, nor is he required so to do. Under § 2041 if the offence is not bailable, upon an application for a writ of *habeas corpus*, the court or judge may grant a writ of *certiorari*. Under a writ of *certiorari* to inquire into the cause of detention, the relator is entitled to no other or greater rights than under a writ of *habeas corpus*. *People ex rel. Taylor v. Seaman*, 8 Misc. 153, 59 St. Rep. 463, 29 Supp. 329.

In case of an infant, the court may either set it free from restraint or commit to the proper custody. *People ex rel. v. Kling*, 6 Barb. 366; *People ex rel. v. Cooper*, 8 How. 288; *People ex rel. v. Olmstead*, 27 Barb. 9. Otherwise an order of discharge only is proper. *People ex rel. v. Porter*, 1 Duer, 709. In *Ex parte Badgley*, 7 Cow. 472, a prisoner was discharged from one only of two causes of imprisonment on which he was held.

Under § 2041, if the offence is not bailable upon an application for a writ of *habeas corpus*, the court or judge may grant a writ of *certiorari*. Under the writ of *habeas corpus*, the body of the person must be produced: if the offence is bailable, the court may then accept bail. If the offence is not bailable there is no necessity of the presence of the detained person upon the argument, and a writ of *certiorari* may be issued which calls for precisely the same return from the custodian, but does not bring the body of the detained person. Under the writ then the same questions

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arise, the same facts appear for determination, and the same limitation rests upon the power of the court as upon a writ of *habeas corpus*. The relator has gained nothing by having two writs. *Peo. ex rel. Taylor v. Seaman*, 8 Misc. 153, 29 Supp. 331, 59 St. Rep. 463.

It was not intended by § 515 of the Code of Criminal Procedure to make any change in the practice on *certiorari* in connection with the writ of *habeas corpus*, and as no provision is there made for proceedings to punish for contempt, or to review any order made for such proceedings, the practice is governed by the same procedure as applies to ordinary cases where private rights are involved, the determination to which may be reviewed by means of a writ of *certiorari*. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, reversing 77 Hun, 612.

Petition for a Writ of Certiorari to Inquire into Cause of Detention. (143 N. Y. 219.)

To Hon. WALTER LLOYD SMITH, one of the Justices of the Supreme Court of the State of New York :

This petition of Frederick L. Taylor respectfully shows :

That he is of the age of 20 years and resides in Plainfield, N. J., but he is at present a student in Cornell University, situate in the city of Ithaca, N. Y.

That he is now a prisoner confined in the custody of Charles S. Seaman, sheriff of the county of Tompkins in the State of New York, and is in the county jail of said county of Tompkins, and has been imprisoned in said jail since March 22d, 1894.

The petitioner further alleges to the best of his knowledge that he is not detained by virtue of any mandate issued by a court or judge of the United States in a case where such court or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court ; nor by virtue of a final judgment or decree of any competent tribunal of civil or criminal jurisdiction, nor by a final order of such a tribunal made in any proceedings instituted for any cause, nor by virtue of an execution or other process issued upon such a judgment, decree, or final order other than as stated hereinafter wherein the reasons of your petitioner's imprisonment are set forth.

The cause or pretence of your petitioner's imprisonment according to the best knowledge and belief of your petitioner is as follows :

That he was subpoenaed and appeared as a witness before the grand jury now in session in the county of Tompkins to give evidence in an inquiry there pending how and by what means and through whom one Henrietta Jackson came to her death in the city of Ithaca, N. Y., on the night of the 20th day of February, 1894.

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That your deponent was sworn as a witness before said grand jury and examined at great length and for some considerable time and answered such questions as were asked of him until he was asked to answer certain questions the answers to which might tend to criminate him and connect him with the commission of the said alleged crime, which questions he refused to answer, giving as his reasons therefor to said grand jury that he refused and declined to answer said questions on the ground that his answers thereto might tend to criminate himself, and that he desired to put himself upon the privilege which the constitution and the laws of the State of New York gave him, and before said grand jury he claimed said privilege personal to himself, whereupon he was adjudged guilty of contempt of court by the court in the court-house in the city of Ithaca, N. Y., on the 22d day of March, 1894, at which court the Hon. Gerrit A. Forbes, one of the justices of the Supreme Court, was presiding, and a commitment was issued to the sheriff of the county of Tompkins against your petitioner, and by virtue of said commitment your petitioner was arrested and imprisoned, and is now by virtue of said commitment confined in the common jail of the county of Tompkins in the keeping of Charles S. Seaman, sheriff of Tompkins County.

That a copy of this commitment is hereto annexed, and the questions asked deponent which he refused to answer for the reasons hereinbefore stated are therein included.

That deponent refused to answer these questions for the reason, as was stated by deponent to said grand jury at the time, that his answers might tend to connect deponent with the commission of the crime and might tend to criminate him if deponent should not refuse to answer these questions; and deponent claimed the privilege which the constitution and the laws of the State of New York gave him, and deponent's refusal to answer was for no other or different reason than that hereinbefore stated by him to the grand jury.

Your petitioner further shows that he is advised by his counsel, John B. Stanchfield, Esq., and verily believes, that his imprisonment is illegal for the reasons above given, and that the said grand jury had no jurisdiction to inquire into the matter as aforesaid.

Your petitioner further alleges that no prior or other application for a writ of *certiorari* to inquire into the cause of your petitioner's detention has been made to any court or judge.

Wherefore, your petitioner prays that a writ of *certiorari* may forthwith issue directed to Charles S. Seaman, sheriff of Tompkins County, commanding him, the said sheriff of Tompkins County, to certify fully and at large to a justice of the Supreme Court the date and cause of the imprisonment of Frederick L. Taylor, by him detained, for the purpose of inquiring into the cause of such imprisonment and detention of your petitioner, and to the end that he may be discharged from confinement.

Dated, March 23, 1894.

FREDERICK L. TAYLOR.

(Add verification hereto.)

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Writ of Certiorari to Inquire into Cause of Detention.

(143 N. Y. 219.)

The People of the State of New York, to CHARLES S. SEAMAN, Sheriff of the County of Tompkins in the State of New York :

We command you that you certify fully and at large to Hon. Walter Lloyd Smith, one of the justices of the Supreme Court of the State of New York, at the court-house in the village of Watkins, Schuyler County, N. Y., on the 26th day of March, 1894, at 2 o'clock in the afternoon of that day, the date and cause of the imprisonment of Frederick L. Taylor, by you detained, it is said, by whatsoever name the said Frederick L. Taylor is called or charged, and have you then and there this writ.

Witness, Hon. Walter Lloyd Smith, Justice of the Supreme Court of the State of New York at Elmira, Chemung County, N. Y., this 24th day of March, 1894.

D. N. HELLER,
Clerk.

Return to Writ of Certiorari to Inquire into Cause of Detention. (143 N. Y. 219.)

SUPREME COURT.

The People of the State of New York *ex rel.*
Frederick L. Taylor,

agst.

Gerrit A. Forbes, a Justice of the Supreme Court of the State of New York of the Sixth Judicial District, and of the Court of Oyer and Terminer in the County of Tompkins, and said State.

To the County Clerk of the County of Tompkins :

The return of Gerrit A. Forbes, justice of the Supreme Court of the State of New York, and of the Court of Oyer and Terminer of the county of Tompkins, in obedience to the writ of *certiorari* hereto annexed :

I hereby certify and return that on the 22d day of March, 1894, the relator, Frederick L. Taylor, was duly subpoenaed and appeared as a witness before the grand jury of the county of Tompkins in a matter then and there and by said grand jury being under investigation, relative to a crime committed in the county of Tompkins, said grand jury being duly in attendance at the Court of Oyer and Terminer then and there being held in the said county of Tompkins, and at which this defendant was presiding justice ; and he, the said Frederick L. Taylor, having appeared before and in the presence of said grand jury, and having then

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and there wilfully and unlawfully and contumaciously refused to answer certain pertinent and lawful interrogatories relating to a matter then being investigated by said grand jury, I, under and by virtue of provisions of § 8 of the Code of Civil Procedure, did adjudge and declare the said Frederick L. Taylor guilty of criminal contempt in so refusing to answer said interrogatories, and did commit the said Frederick L. Taylor to the custody of the sheriff of Tompkins County, by him to be confined in the jail of the said county of Tompkins until purged of his contempt, for a period not exceeding thirty days; that thereupon a mandate or order was duly entered and filed in said Court of Oyer and Terminer so committing the said Frederick L. Taylor as aforesaid, which said mandate or order is hereto annexed and made a part of this return.

And I do further certify that I have caused to be annexed hereto all mandates, orders, testimony, records, and proceedings of every name and nature relating to or bearing upon the commitment and detention of said Frederick L. Taylor as aforesaid of which I have any knowledge or notice, which said orders, mandates, testimony, records, or proceedings are made part of this return.

All of which I hereby certify and return as commanded by said writ and directed by statute.

In witness whereof the undersigned has hereunto set his hand this 21st day of April, 1894.

GERRIT A. FORBES,

*Justice of the Supreme Court of the State of New York of
the Sixth Judicial District and of the Court of Oyer
and Terminer for the County of Tompkins and said
State.*

ARTICLE X.

APPEAL. §§ 2058, 2059, 2060, 2061, 2062, 2063, 2064.

§ 2058. When appeal may be taken in cases under this article.

An appeal may be taken from an order refusing to grant a writ of *habeas corpus* or a writ of *certiorari*, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. Where the final order is made, to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except as prescribed in this section.

§ 2059. *Id.*; by people.

An appeal from a final order, discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken, in the name of the people, by the attorney-general or the district attorney.

See §§ 1356-1361, 2121.

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§ 2060. Prisoner who appeals may be admitted to bail.

Where a prisoner, who stands charged, upon a criminal accusation, with a bailable offence, has perfected, or intends to take, an appeal from a final order dismissing the proceedings, remanding him, or otherwise refusing to discharge him, made as prescribed in this article, the court or judge, upon his application, either before or after the final order, must, upon such notice to the district attorney as the court or judge thinks proper, make an order, fixing the sum in which the applicant shall be admitted to bail, pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.

L. 1873, ch. 663, part of § 1 (9 Edm. 704).

§ 2061. [Am'd, 1895.] *Id.*; recognizance, etc.

The recognizance for that purpose must be conditioned, that the prisoner will appear, at a term of the appellate division of the Supreme Court to be held at a time and place designated in the order, and abide by and perform the judgment of* order of the appellate court. It must be taken and approved by a justice of the Supreme Court, or by the court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made. In all other respects, the proceedings are the same as prescribed in this article, where it appears, upon the return of a writ of *certiorari*, that the prisoner is entitled to be admitted to bail.

§ 2062. [Am'd, 1895.] *Id.*; on appeal to Court of Appeals.

When a prisoner, who stands charged with an offence, specified in the last section has perfected an appeal, to the Court of Appeals, from a final order of the Supreme Court, affirming an order refusing his discharge, or reversing an order granting his discharge; the court, from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail, as prescribed in the last section; except that the recognizance must be conditioned to appear, at a term of the appellate division of the Supreme Court from which the appeal is taken, to abide by and perform its judgment or order, made after the determination of the appeal.

L. 1873, ch. 663, part of § 1, am'd; L. 1895, ch. 946.

§ 2063. Custody of prisoner until he gives bail.

Where the sum, in which a prisoner shall be admitted to bail, has been fixed, as prescribed in either of the last two sections, he must remain in the custody of the sheriff of the county in which he then is, until he is admitted to bail, as therein prescribed; or, if he does not give the requisite bail, until the time to appeal has expired or the appeal is disposed of, and the further direction of the court, made thereupon.

Remainder of same section, am'd.

§ 2064. [Am'd, 1895.] Recognizance valid for adjourned terms.

Where no order or other direction of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance, given as prescribed in § 2061 or § 2062 of this act, the matter is deemed adjourned, without an order to that effect, to the next term of the appellate division of the Supreme Court, to be held in the same department; and thereafter to each successive term, until such an order or direction is made. The prisoner is bound to attend at each successive term of the appellate division; and the recognizance is valid for his attendance accordingly, without any notice or other formal proceeding.

An order directing a further return to a writ of *habeas corpus* or *certiorari*, issued under the Code of Civil Procedure, §§ 2015

* So in the original.

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et seq., to inquire into the cause of detention of a person, is not appealable under § 2058; and the General Term of the Supreme Court has no authority to review it, and where upon an appeal from an order of the General Term reversing such an order, the appeal papers did not show that the objection to its jurisdiction was raised before that court; *held*, that it could be raised in the Court of Appeals. *Matter of Larson*, 96 N. Y. 381, reversing 31 Hun, 539. Where the court has directed a reference in *habeas corpus* proceedings an appeal will not lie from the order, not only because the reference is for the information of the court, but also the order does not present one of the cases appealable under § 2058. *Pco. ex rel. Keator v. Moss*, 6 App. 414.

An order made by a county judge in *habeas corpus* proceedings discharging the prisoner from custody, cannot be reviewed on *certiorari*. Section 357 provides for appeals from orders made in special proceedings; § 2058 provides that an appeal may be taken from the final order made upon the return of the writ of *habeas corpus* to discharge or remand the prisoner; and § 2122 provides that *certiorari* cannot issue to review a determination that can be adequately reviewed by an appeal. *People ex rel. Catlin v. Tucker*, 3 Supp. 792, 16 Civ. Pro. 128.

Where a return on *habeas corpus* shows that the prisoner is detained by virtue of an execution issued upon the judgment of a court, made in an action in which the court confessedly had jurisdiction, the writ should be dismissed and the prisoner remanded. *People ex rel. Crane v. Grant*, 13 Civ. Pro. 209.

The custodian of a prisoner should not be allowed in ordinary criminal cases to maintain an appeal from an order discharging the prisoner from imprisonment, if the appeal is opposed by the prosecuting authorities representing the people. The mere fact that he is a party to the writ and is denominated a defendant in the Code does not give him a right to appeal where he has no interest in the subject-matter. *Matter of Quinn*, 2 App. Div. 103, 25 Civ. Pro. 226, citing *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607.

One committed for contempt may prosecute an appeal from the order of commitment though he has been discharged on *habeas corpus*. *Gallagher v. O'Neil*, 3 Supp. 126, 21 St. Rep. 161.

On appeal to the General Term from the order of the Special

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Term dismissing a writ of *habeas corpus*, requiring defendant to produce an infant, the order was reversed and proceedings remitted to the Special Term for a new hearing. On such hearing an order was made remanding the infant to the custody of relator. A motion was thereupon made to set aside such order on the ground that the Special Term had no jurisdiction to make it, which motion was denied. *Held*, that the order thereon was not reviewable in the Court of Appeals, if without jurisdiction it was within the discretion of the court to set it aside, or leave the defendant to set up its invalidity when an attempt should be made to enforce it. *People ex rel. Brush v. Brown*, 103 N. Y. 684.

The appeal is taken in the usual form and proceeds as on other appeals. In case where the provisions of § 2038 apply, the title of the cause on appeal may be changed by the addition of the name of the interested party.

In *People of the State of New York ex rel. Sinkler v. Terry*, 42 Hun, 273, 5 State Rep. 120, it was held that the appeal having been taken to the General Term in the name of the people, under § 2059, and the order of the lower court affirmed, the costs should be paid by the county from which the appeal is taken.

The power of an appellate court to remit a case for the resentence of a prisoner where the judgment is void but the conviction proper, is limited to cases where the conviction is had upon an indictment, and no power exists to remit a case for resentence to a court of special sessions, such court not being a court of record. *People v. Carter*, 14 Civ. Pro. 241, 48 Hun, 165.

Where upon hearing on *habeas corpus* before a justice of the Supreme Court, the relator was remanded to custody and the General Term on *certiorari* directed to said justice as such, reversed the order and directed the discharge of the prisoner; *held*, that said justice was not the proper person to take an appeal to the Court of Appeals, that the decision affected no substantial right of his within the meaning of the Code of Civil Procedure or of any person of whom he was the legal representative or agent. It seems the appeal in such case should be in the name of the people by the attorney-general or district attorney under § 2059. *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607.

Where, in proceedings by *habeas corpus*, instituted by a guar-

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dian to obtain the custody of a child of about seven years, from one in whose custody the child had been placed in accordance with the wishes of its mother expressed prior to her death, and the order appealed from dismissed the writ without prejudice to other proceedings; *held*, that the order was not a final adjudication as to the legal rights of the relator, and rested in the discretion of the court, and so was not reviewable. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238, 33 St. Rep. 231.

An order made by a special county judge declaring that the rendition warrant of the Governor is invalid and discharging the defendant, is appealable to the General Term, and such appeal is properly taken by the attorney-general by service of the notice of appeal on the clerk and the attorneys for the defendant. *Matter of Scrafford*, 36 St. Rep. 748, 59 Hun, 323, 12 Supp. 945.

Precedent for Recognizance on Appeal from Order Denying Writ.

COUNTY OF ULSTER, ss. :

Be it remembered, that on the 12th day of March, Patrick Larkin, John Larkin, merchant, and James Larkin, mechanic, all of the city of Kingston, in the county of Ulster, personally appeared before the Supreme Court at a Special Term thereof, held in the city of Kingston, and severally and respectively acknowledged themselves indebted to the people of the State of New York in the sum of \$2,000, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following :

WHEREAS, The above-bounden Patrick Larkin is in the custody of the sheriff of Ulster County, under a commitment made by the recorder of the city of Kingston, on a charge of manslaughter ; and

WHEREAS, An application has been made on behalf of said Patrick Larkin for a writ of *habeas corpus*, and the prisoner has been brought up and a hearing had and the proceedings dismissed, and said Patrick Larkin remanded ; and

WHEREAS, An appeal has been taken by him from said final order remanding the proceedings on *habeas corpus*, and an order granted admitting him to bail pending said appeal : Now, therefore, the condition of this recognizance is such that if the said Patrick Larkin shall appear at a General Term of the Supreme Court, to be held at the City Hall in the city of Albany, on the 3d day of May, 1887, and abide by and perform the judgment of the appellate court on said appeal, then this recognizance to be void, otherwise to remain in full force and effect.

(Signatures.)

Taken, subscribed and acknowledged, and approved }
before me this 12th day of March, 1887. }

A. B. PARKER,
Justice Supreme Court.

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Order Fixing Bail.

At a Special Term the Supreme Court held in and for the county of Ulster, at the court-house in Kingston, on the 12th day of March, 1887 :

Present :—Hon. Alton B. Parker, *Justice*.

In the Matter of the Application of Patrick Larkin for a writ of <i>habeas corpus</i> .	}
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A writ of *habeas corpus* having been heretofore issued on the application of Patrick Larkin, and the said Patrick Larkin having been brought before the court, pursuant to the command of said writ and after hearing had, the proceedings on said writ having been dismissed by final order and the said Patrick Larkin remanded : Now, after hearing Charles A. Fowler, Esq., for the prisoner, on behalf of the application, and J. N. Vanderlyn, district attorney, opposed, and it appearing that the said Larkin is accused of a bailable offence, to wit, the crime of manslaughter, and that the said Larkin has taken an appeal from the said final order dismissing the proceedings on *habeas corpus*, it is ordered that the said Patrick Larkin be admitted to bail pending such appeal in the sum of \$2,000, and that he be discharged upon perfecting such bail.

Indorsed :—"Granted at within term.

"J. D. WURTS,
" *Clerk*."

CHAPTER V.

MANDAMUS.*

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* This subject is treated in High on Extraordinary Legal Remedies, Spelling on Extraordinary Relief, Wood on Mandamus, Merrill on Mandamus, Moses on Mandamus. Short on Extraordinary Legal Remedies, article "Mandamus," American and English Encyclopedia of Law, and valuable notes on the subject are also contained in Lawyers' Reports Annotated, vols. 1, 3, 8, 12, and 13 respectively.

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ARTICLE I.

 NATURE OF THE WRIT ; WHEN AND AGAINST WHOM
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- SUB. I. WRIT DEFINED.**
2. PURPOSE OF THE WRIT ; WHEN IT LIES.
 3. WHEN GRANTED AGAINST STATE OFFICERS.
 4. WHEN GRANTED AGAINST COUNTY OFFICERS.
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 7. WHEN GRANTED AGAINST ELECTION OFFICERS.
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 9. WHEN GRANTED TO CONTROL RIGHT TO PUBLIC OFFICE.
 10. WHEN GRANTED IN MATTERS RELATING TO TAXATION.
 11. WHEN GRANTED TO COMPEL ACTION BY INFERIOR TRIBUNALS.

SUB. I. THE WRIT DEFINED.

The writ of mandamus is a command issuing from a court of law of competent jurisdiction in the name of the State or sovereign directed to some inferior court, officer, corporation, or person, requiring them to do some particular thing therein specified and which appertains to their office or duty. 3 Blackstone, Com. 110, 4 Bacon, Abr. 495, American and English Encyc. of Law, vol. 14, page 91. It is the proper remedy when the party has a clear right and no other appropriate redress in order to prevent a failure of justice. *Rex v. Barker*, Burr. 1267, where Lord Mansfield defined it as a writ, "to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court." In *Ex parte Crane*, 5 Peters, 190, it is said that in England the writ is a command issuing in the King's name, directed "to any persons, corporation or inferior court of judicature within the King's dominion, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court has determined to be consonant to right and justice."

The practice has been very greatly modified in this country and is thus described by a leading American text writer: "The

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modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction in the name of the State or sovereign to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed or from operation of law." High on Extraordinary Remedies, 4. A mandamus is said by Chief Justice Marshall to be a suit within the meaning of the Constitution, for it is a litigation of a right in a court of justice. *Weston v. Charleston*, 2 Pet. 449 ; *Holmes v. Jennison*, 14 Pet. 540. Taney, C. J., said in *Commonwealth v. Dennison*, 24 How. 66 : " It is well settled that a mandamus in modern practice is nothing more than an action at law between the parties, and it is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown and was subject to regulations and rules which have long since been disused. But the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

Mandamus is an extraordinary remedy, and the power to entertain it has been exercised only in the past by the higher courts of common-law jurisdiction, where it properly belongs. *People ex rel. v. Board of Excise*, 3 State Rep. 253. This writ it has often been said will not be granted in doubtful cases, but it is questionable whether this now means more than that there must be a clear, legal right to relief, and no other adequate remedy. In cases where it is applicable these considerations are the test to be applied. *People v. Thompson*, 25 Barb. 73.

Vann, J., thus states the object of the writ in *People ex rel. Harris v. Commissioners*, 149 N. Y. 30, reversing 90 Hun, 525 : " The primary object of the writ of mandamus is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, this command is never given to compel the discharge of a duty involving the exercise of judgment or discretion, in any specified way, for that would substitute the judgment or discretion of the court issuing the writ for that of the person or persons against whom the writ was issued. In

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such cases its sole function is to set in motion, without directing the manner of performance. . . . When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus, if there is no other remedy ; when, however, the law requires a judicial determination to be made, such as a decision of a question of fact or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance."

SUB. 2. PURPOSE OF THE WRIT AND WHEN IT LIES.

The following principles are applicable to the granting or refusing of a writ of mandamus as laid down in *People ex rel. The Gas Light Co. of Syracuse v. The Common Council of Syracuse*, 78 N. Y. 56: "Although the granting or refusal of a writ of mandamus is regarded as discretionary, as distinguished from a writ of right, it is not an absolute or arbitrary discretion, but is to be exercised under, and may be regulated and controlled by, legal rules, and the exercise of the discretion is reviewable here. Where the writ is refused, and it appears that there is a clear legal right, and that there is no other adequate remedy, the order or judgment may be reversed. Where the relator has for an unreasonable time slept upon his rights, the court may refuse the writ. In determining what will constitute such unreasonable delay, regard should be had to circumstances justifying the delay, to the nature of the case, the relief demanded, and to the question whether the rights of defendant or other persons have been prejudiced by the delay." Cited, *People ex rel. King v. Gallagher*, 93 N. Y. 466 ; *People ex rel. Millard v. Chapin*, 104 N. Y. 99. In the former of these cases it is said that the court has no discretion to exercise where the writ affords the only adequate remedy ; in the latter that the discretion of the court to grant or refuse the writ is not absolute but governed by legal rules and its discretion is subject to review.

That the writ is discretionary and that the court should exercise a sound discretion with reference to granting it is held in *People ex rel. New York Underground Ry. Co. v. Newton*, 126

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N. Y. 656, citing *Matter of Sage*, 70 N. Y. 220 ; *People ex rel. Slavin v. Wendell*, 71 N. Y. 171 ; *People ex rel. Faile v. Ferris*, 76 N. Y. 326 ; *People ex rel. Nichol v. New York Infant Asylum*, 122 N. Y. 190 ; and also *People ex rel. Gas Light Co. v. Common Council of Syracuse*, 78 N. Y. 56 ; *People v. Chapin*, 104 N. Y. 96, *supra*.

To entitle a party to a writ of mandamus, he must be dispossessed of a clear legal right to have exercised an office or franchise or to have a service performed by the party to whom he seeks to have the writ directed, and must be without a legal remedy to which he can resort to compel the performance of the duty. *Bayard v. United States*, 127 U. S. 246 ; *Ex parte Hughes*, 114 U. S. 147 ; *People ex rel. Mott v. Supervisors of Green*, 64 N. Y. 600 ; *People v. Hayt*, 66 N. Y. 606 ; *People v. Brooklyn*, 1 Wend. 318 ; *People v. Supervisors of New York*, 18 Abb. 8 ; *People v. Easton*, 13 Abb. N. S. 159 ; *Clark v. Miller*, 47 Barb. 38 ; *People v. Supervisors of Green*, 12 Barb. 217 ; *Ex parte Nelson*, 1 Cowen, 417 ; *Ex parte Lynch*, 2 Hill, 45 ; *People v. Starr*, 55 How. Pr. 388 ; *People v. Supervisors of Chenango Co.*, 11 N. Y. 563 ; *People v. Booth*, 49 Barb. 31 ; *People v. Wood*, 35 Barb. 653, 2 Abb. 90 ; *People ex rel. Moulton v. Mayor of New York*, 10 Wend. 393 ; *People v. Thompson*, 25 Barb. 73.

The court will not award a mandamus when full relief can be had by any other remedy. *People v. Lott*, 42 Hun, 408 ; *People v. New York Police Commissioners*, 107 N. Y. 235, although the remedy will not be denied merely because the relator may have a remedy by action for damages. *People v. Taylor*, 1 Abb. N. S. 200, 30 How. Pr. 78. While the existence of an adequate remedy at law will be ground for refusing a writ, the fact of existence of an equitable remedy is not an objection. *People v. Mayor of New York*, 10 Wend. 395.

The relator must have the right to the performance of some particular act or duty at the hands of the respondent, and the case must be one in which the law affords no adequate remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce. *People v. Supervisors of Green*, 12 Barb. 217. And this subject to the restriction that this must be a right to have the act performed by some corporation, officer, or board, or by an inferior court. *Dunklin County v. District Co. Court*, 23 Mo. 449.

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The writ is never granted except for public purposes and to command the execution of public duties. *Fish v. Weatherwax*, 2 Johns. Cas. 215 ; Bacon's Abridgment, title Mandamus. The general principles applicable to the writ are that it will not issue when it would be unavailing. *People v. Supervisors of Westchester*, 15 Barb. 607 ; *Colonial Life Ins. Co. v. Supervisors of New York*, 24 id. 166. It is never granted in anticipation of a refusal to act. High on Extraordinary Remedies, 14. Mandamus will sometimes lie against a municipal corporation when there is another remedy. *People v. Green*, 2 T. & C. 62. But it seems not when the remedy at law is adequate. *People v. Common Council*, 8 Week. Dig. 82. The practice under the Code of Civil Procedure was unsettled, being derived from the common law, and modified from time to time to meet new statutes. The proceedings up to the time of the Code of Procedure by this writ were comparatively rare, and by it no provision was made for rules of practice, and great confusion arose after its enactment as to the proper method of procedure, it being questioned for a long time whether it was an action or special proceeding ; and it was in *People v. Lewis*, 28 How. Pr. 470, held to be an action, yet the procedure at common law was held applicable. It is now a special proceeding.

The codifiers, in framing the New Code, have devoted themselves exclusively to regulating the mode of procedure, and have made no attempt to define the cases in which the writ will lie. The power to issue the writ is confined to courts of general common-law jurisdiction, and these courts will be governed in administering relief by the writ by the same conditions and limitations as existed at common law, and will not issue the writ where another adequate remedy is provided by law. *Kimball v. Union Water Co.*, 44 Cal. 173. The writ is most frequently used to compel public officers to perform some act in the line of their duty and is appropriate to that function. *United States v. Commissioners, etc.*, High on Extraordinary Remedies, 32. There must, however, be such officers in being, and it will not run against officers who have never qualified, or who are *functus officio*, or where their term has expired. *State v. Beloit*, 21 Wis. 280 ; *State v. Waterman*, 5 Nev. 323 ; *Mason v. School District*, 20 Vt. 487. But, when it is a duty which would be incumbent on their successors, the fact that the term is about to expire is no

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answer. *People v. Collins*, 19 Wend. 56; *People v. Champion*, 16 Johns. 61. The writ will only be granted where there is a discretion to be exercised for the purpose of putting the officer, court, or board in motion, but will not control his or its action, or dictate the decision to be made or judgment to be rendered. *People v. Brennan*, 39 Barb. 651; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Contracting Board*, 27 id. 378; *People v. Booth*, 49 Barb. 31; *People v. Common Council*, 78 N. Y. 33; *People v. Canal Appraisers*, 73 id. 443; *People v. Fairman*, 91 id. 385. In *People ex rel. v. Baker*, 14 Abb. 19, many of the points above noted are discussed and passed upon. Whenever a party has a legal right and is entitled to a remedy, and the court, official, or corporation, whose duty it is to act, refuses to do so, the writ lies. *People ex rel. v. Clerk Marine Court*, 3 Abb. 309, Court of Appeals; *People ex rel. v. Hayt*, 66 N. Y. 606; *Adriance v. Supervisors*, 12 How. 224; *People ex rel. v. Taylor*, 1 Abb. (N. S.) 200; *People ex rel. v. St. Patrick's Cathedral*, 10 Week. Dig. 124; *People v. Wendell*, 71 N. Y. 171; *People v. Thompson*, 25 Barb. 73; *People v. Green*, 63 id. 390; *People v. Martin*, 62 id. 570; *People v. Inspectors*, 44 How. 322; *People v. Haws*, 12 Abb. 204; *People v. Hawkins*, 46 N. Y. 9.

The writ is granted where remedy by action is doubtful. *People v. Havemeyer*, 16 Abb. (N. S.) 219; *People v. Supervisors*, 11 N. Y. 563; *People v. Green*, 58 id. 295; *People v. Steele*, 2 Barb. 417; *People v. Canal Board*, 13 id. 440; *Clark v. Miller*, 47 id. 38, 54 N. Y. 528. The granting of the writ has been in certain cases held to be entirely discretionary, and that no appeal lies to Court of Appeals from refusal in cases where it depends on discretion. *Van Rensselaer v. Sheriff*, 1 Cow. 501; *People ex rel. v. Supervisors*, 15 Barb. 607; *People ex rel. v. Dowling*, 55 id. 197; *People ex rel. v. Common Council*, 52 How. 346; *People ex rel. v. Booth*, 49 Barb. 31; *People ex rel. v. Ferris*, 76 N. Y. 326; *People ex rel. v. Campbell*, 72 id. 496; *Sage v. Railroad Co.*, 70 id. 220; *People v. Dowling*, 37 How. 394; *People v. Aslen*, 7 Week. Dig. 411. Where a party has a sufficient remedy at law against a public officer, the court is not absolutely bound to grant a writ of mandamus, but it may in its discretion refuse, and this discretion is not reviewable by the Court of Appeals. *People ex rel. v. Thompson*, 99 N. Y. 641, following *People v. Campbell*, 72 id. 496. But while it is not a writ of right, this discretion is to be exercised and is to be regulated and controlled by sound legal principles. *Fish v.*

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Weatherwax, 2 Johns. Cas. 215; *People ex rel. v. Common Council*, 9 Week. Dig. 43, Court of Appeals; s. c. 78 N. Y. 56. There must be a clear legal right and no other legal remedy. *People v. Supervisors of Chenango*, 1 Kern. 563; *People v. Supervisors of Green*, 12 Barb. 217; *People v. Canal Board*, 13 id. 444; *People v. Croton Board*, 26 id. 240; *People v. Supervisors of Richmond*, 21 How. 335; *People v. Corporation of Brooklyn*, 1 Wend. 324; *People v. Supervisors of Columbia*, 10 id. 363; *People v. Mayor of New York*, id. 397; *People v. Supervisors of Chenango*, 11 N. Y. 563; *People v. Easton*, 13 Abb. (N. S.) 159; *People v. Fay*, 3 Lans. 398; *People ex rel. Badgley v. Supervisors of Green*, 1 Hun, 1; *People v. Auditors of Shawangunk*, 1 How. (N. S.) 224; *People ex rel. v. Supervisors*, 18 Abb. 8; *People ex rel. v. Coffin*, 7 Hun, 608; *People ex rel. v. Board of Apportionment*, 64 N. Y. 627; *People ex rel. v. Campbell*, 72 id. 496; *Clark v. Muller*, 54 id. 528; *People ex rel. v. Green*, 11 Hun, 56; *People ex rel. v. Hawkins*, 46 N. Y. 9. The writ is said to lie to corporations and municipal officers, although there is a remedy by action. *Buck v. City of Lockport*, 6 Lans. 251; *People ex rel. v. Steele*, 2 Barb. 397; *People ex rel. v. Myer*, 10 Wend. 393; *McCullough v. Meyer*, 23 id. 458. But see *People v. Board of Supervisors of Chenango*, 11 N. Y. 573. It will not be awarded where there is a remedy by action. *Ex parte The Fireman's Ins. Co.*, 6 Hill, 243; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *People ex rel. v. Coal Co.*, 10 How. 544; *In the Matter of Boice*, 2 Cow. 444; *People v. The Mayor of New York City*, 25 Wend. 680; *People v. The Supervisors of Chenango Co.*, 1 Kern. 563; *People v. The President of Brooklyn*, 1 Wend. 318; *People v. Tioga Common Pleas*, 19 id. 73; s. c. 13 Abb. 374; *People v. Fernando Wood, Mayor, etc.*, 35 Barb. 653; *People v. Stevens*, 5 Hill, 616; *People v. Dikeman*, 7 How. 124; *People v. Green*, 11 Hun, 61; *People v. French*, 24 id. 263. Except in special cases. *People v. Supervisor*, 70 N. Y. 228. As to how far this is true when the writ is directed to ministerial officers and corporations see *McCullough v. Mayor of Brooklyn*, 23 Wend. 458; *People v. Steele*, 2 Barb. 398; and *People v. Supervisors of Chenango*, 1 Kern. 573. The writ will not issue to compel an act requiring discretion or to review an act requiring discretion. *People v. Common Council*, 78 N. Y. 33; *People v. Supervisors of Westchester*, 12 Barb. 446; *Ex parte Baily*, 2 Cow. 479; *Ex parte Bassett*, id. 458; *People v. N. Y. Common Pleas*, 19 Wend. 113; *People v. Con-*

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tracting Board, 27 N. Y. 378; *People v. Booth*, 49 Barb. 31; *People v. Taylor*, 1 Abb. (N. S.) 200; *Hutchinson v. Commissioners*, 25 Wend. 692; *People ex rel. v. Leonard*, 74 N. Y. 443; *Bearns v. Gould*, 77 id. 95; *People v. Common Council*, 20 Alb. L. J. 269; *People v. Common Council*, 9 Week. Dig. 68. It will not be issued where there is doubt as to the right of the claimant. *People v. West Troy*, 25 Hun, 179. It will not lie to review the discretion of a railroad company in failing to furnish suitable passenger and freight houses at a station, even where facts appear which show the duty to be imperative. *People v. N. Y. & L. E. R. R. Co.*, 5 State Rep. 551, reversing 40 Hun, 571. When the act, the doing of which is sought to be compelled, is final, the right to have the act performed may be inquired into. *People ex rel. v. Canal Appraisers*, 13 Hun, 64, 73 N. Y. 443. It is not discretionary for supervisors to refuse to levy any sum where the liability is plain, and no dispute as to amount. *People ex rel. v. Supervisors of Delaware*, 9 Abb. (N. S.) 408, 45 N. Y. 196; same principle, *People v. Green*, 66 Barb. 630. It has been held the writ will not always be granted, though there is no other remedy. *Ex parte Ostrander*, 1 Denio, 679; *People v. Dowling*, 55 Barb. 197. But it may issue, though there is a remedy by *certiorari*. *People ex rel. v. Taylor*, 30 Hun, 78. It will not be granted to enforce action under a statute so badly drawn it cannot be enforced, or where it is of doubtful constitutionality. *People v. Robinson*, 14 Hun, 226, 76 N. Y. 422; *People v. Canal Board*, 4 Lans. 272. Where there is a remedy by appeal, writ will not lie. *People v. Coffin*, 7 Hun, 608. Or by action. *People v. Inspectors*, 44 How. 322; *People v. Lott*, 41 N. Y. 408. If too much is asked, the rule has been laid down that the writ will be denied. *People v. Cady*, 2 Hun, 224; *People v. Port Jervis*, 8 Week. Dig. 243; *People v. Green*, 64 Barb. 162. It was held under the old Code that the writ would be refused when there had been great delay in the application. *People v. Tremain*, 29 Barb. 96; *People v. Taylor*, 30 How. 78; *People v. Common Council*, 52 id. 346. See *People v. Cooper*, 24 Hun, 337. But some injury from the delay should be shown to prevent the issue of the writ. *People v. Common Council*, 9 Week. Dig. 43; s. c. 78 N. Y. 56. But under the present Code, it has been held at Special Term that the time under which the writ may be asked is the same as limitation of an action. *People v. Beach*, 3 Civ. Pro. 180, 12 Abb. (N. S.) 156. The writ

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will be refused where great delay has resulted in payment of moneys being made to another claimant. *People v. O'Keefe*, 17 Week. Dig. 536. Six years is the limitation of time within which the writ must be asked. *People v. French*, 31 Hun, 617; *People v. Police Comm'rs*, N. Y. Daily Reg., Aug. 2, 1883. But the proper officer may be compelled to accept payment of taxes by mandamus, and the Statute of Limitation is no bar. *People v. Cady*, 51 N. Y. Super. 316. Mandamus should not be granted where the defendant has been legally enjoined from doing what the relator seeks to have done. *People v. West Troy*, 25 Hun, 179; *People v. Supervisors of Ulster*, 30 id. 146. Every citizen has the right to compel public officers to execute the laws of the State, and citizens can compel a board of health to organize. *People v. Daly*, 37 Hun, 461.

It will not lie to compel cemetery association to allow burial. *People v. Trustees of Cathedral*, 21 Hun, 184, reversing *Copper's Case*, 7 Abb. N. C. 121. Or to compel an officer to carry out the will of a corporation. *People v. Brennan*, 39 Barb. 522. It was held in *Ex parte Fireman's Ins. Co.*, 6 Hill, 243, that mandamus would not issue to compel transfer of stock. *Shipley v. Mechanics' Bank*, 10 Johns. 484; *People v. Parker Vein Coal Co.*, 10 How. 544. But see *People v. Mead*, 24 N. Y. 120. Or to transfer certificate of membership in exchange. *People v. Miller*, 39 Hun, 557. In *People v. Commissioners of Excise*, 7 Abb. 34, it was held the writ would not lie to compel excise board to issue license. But see chap. 496, Laws 1886, and *People v. Becker*, 3 State Rep. 202. It was held in *People v. Babcock*, 16 Hun, 313, that the writ would not be granted to compel an express company to carry goods. But see *People v. N. Y. C. R. R.*, 28 Hun, 543, where it was held that, in an action brought by attorney-general in name of the people, mandamus will lie to compel railroad corporation to exercise its duty as a carrier of freight and passengers. Persons who have been inmates of a charitable institution but have no other rights cannot be reinstated as inmates by mandamus. *People v. Trustees of Sailors' Snug Harbor*, N. Y. Daily Register, May 7, 1883. The writ will not issue to compel a corporation to remove a telegraph pole erected by a corporation, the remedy is an action for damages. *People ex rel. McManus v. Thompson*, 32 Hun, 93. The writ will not run against a foreign corporation to compel it to exhibit its books to a stock

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holder. *People v. N. P. R. R. Co.*, 50 N. Y. Super. 456. It has been held it will not lie to compel a religious corporation to restore a relator to membership. *People v. German Church*, 53 N. Y. 103.

Whether the relator has a clear legal right and is entitled to have the thing done may be inquired into both by the party moved against and by the tribunal applied to. *Pco. ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 399, citing *Pco. ex rel. Freer v. Canal Appraisers*, 73 N. Y. 443. Mandamus will not lie unless there be a clear legal right to the relief and no other adequate legal action to obtain it. *Pco. ex rel. McMackin v. Board of Police*, 107 N. Y. 235, affirming 46 Hun, 296. The right to a peremptory writ depends upon a clear legal right to the relief sought by it, and when it rests in any substantial doubt or the facts upon which it depends are in any essential respect controverted by affidavit, such writ will not be allowed to issue. *Pco. ex rel. N. Y. Exchange Bank v. Stupp*, 49 Hun, 544, 2 Supp. 537, 18 St. Rep. 500.

Mandamus will not lie to compel a board of supervisors to allow a claim by a district attorney for expenses incurred in proceedings for the extradition of fugitives from justice. *People ex rel. Gardenier v. Board of Supervisors*, 2 Supp. 351, reversed, 56 Hun, 17, which was affirmed, 134 N. Y. 1. One is not entitled to mandamus against the public officers of a city to remove a telegraph pole, even if the ordinance authorizing the erection were void because no compensation was made to the relator for the taking of his private property, the remedy being by action. *Pco. ex rel. McManus v. Thompson*, 32 Hun, 93.

Mandamus will not lie to compel the payment of the salary of a school teacher, the claimant having an action at law. *Pco. ex rel. Steinson v. Board of Education of N. Y.*, 60 Hun, 486, 39 St. Rep. 570, 15 Supp. 308. The discretion of the court to grant or refuse a writ of mandamus is not absolute, but is governed by legal rules, and its exercise is subject to review upon appeal. *Pco. ex rel. Millard v. Chapin*, 104 N. Y. 96, reversing 40 Hun, 386. "There is no dispute as to the rule of law that a mandamus against a public officer or municipality is a proper remedy to compel the performance of a ministerial duty plainly prescribed, and may be invoked in behalf of any party interested in its performance, on the failure of the officer or public body to do the

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act or thing required. But where the officer or body is clothed with discretion, and may do or omit to do the act or thing according to the judgment of the person or body authorized to act, then a mandamus can only issue to compel a decision in case of a refusal to decide, and when a decision is made the remedy by mandamus ends. The court cannot on mandamus review the decision made, or compel a decision the other way because the court may disagree as to the justice or propriety of the conclusion reached. The broad distinction is between duties mandatory and peremptory and those involving discretion and judgment. In the one case the public agent cannot refuse to act or to do the thing required, and in the other the court is not permitted to substitute its judgment for that of the person or body clothed by the law with the power to decide." Andrews, Ch. J. *Peo. ex rel. Wooster v. Mahar*, 141 N. Y. 330, 57 St. Rep. 425. A preference is given where the writ of mandamus has been issued from the appellate division to Special Term or a judge thereof in the discretion of the court. Section 792 of the Code of Civil Procedure.

Mandamus to boards of election officers provided for by § 133 of the Election Law is referred to and authorities cited under it under that head. Mandamus is also provided for by § 31 of the Public Health Law, which provides that the performance of any duty or the doing of any act enjoined, prescribed or required by Art. 2 of the Health Law may be enforced by mandamus at the instance of the State board of health, or the president or secretary of the local board or the president and secretary, and any citizen of full age and a resident of the municipality where the deed should be performed or the act done.

It is provided by § 67 of the Railroad Law that the Supreme Court at Special Term shall have power in case of a decision by the railroad commissioners to compel a compliance therewith by mandamus, subject to appeal to the appellate division and to the Court of Appeals in the same manner and with like effect as provided in cases of appeal in any order of the Supreme Court.

The act relative to drainage, as amended by Laws of 1897, chap. 249, provides that the court in which the proceeding is opened shall have jurisdiction by mandamus upon the petition of any party grieved to enforce prompt compliance with § 11 of that law by any official charged therewith.

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SUB. 3. WHEN GRANTED AGAINST STATE OFFICERS.

The writ will lie to comptroller to perform a statutory duty. *People v. Allen*, 42 N. Y. 404. But where the comptroller has refused an application to cancel the sale of land for taxes upon the ground that the sale was regular, he cannot be compelled by mandamus to reach a different conclusion. *People ex rel. v. Chapin*, 3 St. Rep. 38, 103 N. Y. 635, affirming 39 Hun, 230. The remedy, however, against the comptroller by a party aggrieved as to cancellation of taxes is by *certiorari* and not by mandamus. *People v. Chapin*, 39 Hun, 230. The writ lies to the Secretary of State. *People v. Nelson*, 3 Lans. 394, 46 N. Y. 477; *People v. Beach*, 57 How. 337. Also to the treasurer. *People v. Bristol*, 1 Lans. 45. And to the attorney-general. *People v. Tremain*, 17 How. 10. See *id.* 142. Also to the auditor to issue a draft. *People v. Thayer*, 63 N. Y. 348; *People v. Schuyler*, 79 *id.* 181; *People v. Thayer*, 4 Hun, 798. To compel canal appraisers to appraise. *Ex parte Jennings*, 6 Cow. 518. To commissioners to award contract. *People v. Contracting Board*, 46 Barb. 254. To superintendent of insurance department. *Matter of N. A. Ins. Co.*, 9 Week. Dig. 478, Court of Appeals. It runs against auditor of canal department. *People v. Bell*, 38 N. Y. 386. To compel canal appraisers to make return on appeal. *People v. Canal Appraisers*, 73 N. Y. 443. It does not lie to compel award of contract when it has been, although wrongfully, awarded to another. *People v. Contracting Board*, 27 N. Y. 378. Or to compel award to lowest bidder when his bid is informal. *Weed v. Beach*, 56 How. 470. The writ was set aside as improperly granted against superintendent of insurance. *People v. Chapman*, 64 N. Y. 557. And refused to militia officer against Governor. *People v. Schrugham*, 25 Barb. 216. Writ does not lie to compel attorney-general to bring suit. *People v. Fairchild*, 67 N. Y. 334. A decision and recommendation of the board of railroad commissioners, that a railroad company should furnish proper freight accommodations at an established station, is binding upon the company, subject to the determination by the Supreme Court of the question whether the action of the board was just and reasonable, and such decision and recommendation may be enforced by mandamus. *Peo. v. Prest., etc., D. & H. C. Co.*, 32 App. Div. 120, 52 Supp. 850, 86 St. R. 850. Mandamus will not lie to the Governor to compel him to perform

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either executive or ministerial duties. *Peo. ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. Rep. 791. Mandamus may be granted against the Lieutenant-Governor and Speaker of the Assembly during a recess of the legislature, unless they have succeeded to the executive power. *Peo. ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. Rep. 791. Mandamus will not lie to require the superintendent of the insurance department to correct the report of examiners appointed by him to examine into the condition of an insurance company, as no such duty is imposed upon him by law. *Peo. ex rel. Long Island Mut. F. I. Co. v. Payn*, 26 App. Div. 584, 50 Supp. 334, 84 St. R. 334. Mandamus will lie to the State comptroller to compel the full payment of a judge's salary. *People ex rel. Bockes v. Wemple*, 115 N. Y. 302. It will lie to the comptroller to compel him to issue warrants to a university for the payment of money appropriated by Congress for the maintenance of educational institutions. *People ex rel. Cornell University v. Davenport*, 117 N. Y. 549. It will lie to the Civil Service Commission to compel them to place the name of the relator on the list of eligibles under the Civil Service Act, where his name has been illegally stricken therefrom. *People ex rel. Van Petten v. Cobb*, 13 App. Div. 56.

It will not lie to the attorney-general to compel him to attach his certificate to an application for incorporation pursuant to § 10, chapter 725, Laws of 1893. *People ex rel. Woodward v. Rosendale*, 76 Hun, 103, affirmed, 142 N. Y. 126, reversing 5 Misc. 379. But the attorney-general may be required to certify to a judgment which has been certified to by the clerk of the court, as required by § 3241, Code Civil Procedure. *People ex rel. Fargo v. Rosendale*, 76 Hun, 112, 57 St. Rep. 377, 27 Supp. 825, affirmed, 142 N. Y. 670. It will lie to the Secretary of State to compel him to furnish a contractor for public printing with necessary material from which the printing is to be done, although he had previously made arrangements for such printing with another party. *People ex rel. Weed-Parsons Co. v. Palmer*, 14 Misc. 41, 68 St. Rep. 166, 35 Supp. 222. But the writ will not lie to the superintendent of public works to compel him to award a contract to an unsuccessful bidder, unless the successful bidder be made a party to the proceedings, or if the award has been made, to compel the superintendent to make

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an award to another. *Matter of Hilton Bridge Construction Co.*, 13 App. Div. 24. Nor will it lie to the Commissioners of the Land Office to compel them to direct the payment of original purchase moneys, on the ground that the title of the people has failed, such a determination involving a judicial function. *People ex rel. Harris v. Commissioners*, 149 N. Y. 26.

Mandamus will not lie to the superintendent of public works to award to the petitioner a public contract where the statute providing therefor states that the contract shall "be let to the lowest bidder, . . . except such portions thereof as in the judgment of the Superintendent of Public Works and State Engineer can be so done to the best interest of the State." Where the contention of the relator in such a case is that the bid of the successful bidder was too indefinite, he is merely entitled to have such bid set aside, and then to require such officers either to accept his bid or to advertise anew. *Matter of Hilton Bridge Construction Co.*, 13 App. Div. 24

SUB. 4. WHEN GRANTED AGAINST COUNTY OFFICERS.

Mandamus will issue to county treasurer to pay a valid audit by supervisors. *People v. Stout*, 23 Barb. 338; *People v. Edmonds*, 19 id. 468; *People v. Edmonds*, 15 id. 529; *People v. Fitzgerald*, 54 How. 1; *People v. Earle*, 16 Abb. (N. S.) 64. See *Healey v. Dudley*, 5 Lans. 115; *People v. Starr*, 55 How. 388. Or to issue warrant for collection of tax. *People v. Halsey*, 37 N. Y. 344. But not where the supervisors had no jurisdiction to audit. *People v. Lawrence*, 6 Hill, 244. Or where a portion of claim is fraudulent. *People v. Wendell*, 71 N. Y. 171. Nor a claim for which creditor has already accepted obligation of third party as payment. *People v. Cromwell*, 102 N. Y. 477. It will issue to compel county clerk to record a deed. *Ex parte Goodell*, 14 Johns. 325. To compel register to file a satisfaction-piece. *People v. Miner*, 37 Barb. 466; *People v. Sigel*, 46 How. 151. The obligation imposed upon a register of deeds to permit the books, maps, and records of his office to be examined, is absolute in its character and may be enforced by mandamus. Citing *People v. Supervisors*, 64 N. Y. 600; *People v. Wendell*, 71 id. 171; *Fiedler v. Mead*, 24 id. 114. The register has, however, power to exercise his discretion as to the good order of the office and preservation of the records. To that extent his powers and duties are not

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subject to be interfered with or controlled by mandamus. *People ex rel. Title Guaranty Co. v. Reilly*, 38 Hun, 429, citing *People ex rel. German American, etc., Co. v. Richards*, 99 N. Y. 620. It is said a surrogate may be compelled to award letters to party entitled. *Case of Petullo*, 1 Tuck. 99. To compel sheriff to execute a deed. *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 501 ; *People v. Fleming*, 2 N. Y. 484 ; *People v. Beebe*, 1 Barb. 379. It will run against the commissioner of jurors in New York city to compel him to strike the name of a person not liable for jury duty from the list. *People v. Taylor*, 45 Barb. 129. To clerk of Marine Court, to compel him to issue execution on a judgment. *People v. Gale*, 22 Barb. 502 ; s. C. 3 Abb. Ct. App. 491. It will not be granted to interfere with discretion of excise commissioners. *Kelly v. Excise Commissioners*, 54 How. 327. Mandamus will issue in a proper case to compel a register to accept from owners arrears for taxes, even though an invalid sale has been made. *Clementi v. Jackson*, 92 N. Y. 591.

The writ will not issue to interfere with the discretion of supervisors where they have a discretion to exercise, but if they refuse to audit, for any sum, a legal claim, on the ground it is illegal, mandamus will issue. *People v. Supervisors*, 51 N. Y. 401 ; *Hall v. Supervisors*, 19 Johns. 259. It will lie to revoke an audit in excess of what is allowed by law. *People v. Supervisors*, 73 N. Y. 173. It will lie to compel board to audit claims of county officers. *People v. Supervisors*, 32 N. Y. 473 ; *People v. Supervisors*, 45 id. 196 ; *Bright v. Supervisors*, 18 Johns. 242. Also to compel action as to highway damages. *People v. Supervisors*, 20 N. Y. 252 ; *People v. Supervisors*, 4 Barb. 64. Also to issue warrant for military tax. *People v. Supervisors*, 8 N. Y. 317. Also to compel board to obey order of county court, as to correction of amount. *People v. Supervisors of Ulster*, 65 N. Y. 300. To compel repayment of taxes on property assessed in two towns. *People v. Supervisors*, 85 N. Y. 612. To compel supervisors to strike out illegal levy. *People v. Supervisors*, 17 Week. Dig. 139. And to allow claim for repayment of taxes. *People v. Supervisors*, 51 N. Y. 401. To compel audit of an account where there is no discretion as to amount. *Boyce v. Supervisors*, 20 Barb. 294. The board may be compelled to reassemble and perform duties neglected at annual meeting. *People v. Supervisors*, 8 N. Y. 317. The board may be compelled to allow ac-

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counts of overseer of the poor. *People v. Supervisors*, 2 Cow. 530. To restore to the rolls property stricken off improperly. *People v. Supervisors*, 4 Hill, 20; S. C. 7 id. 504. To re-audit claim. *People v. Supervisors*, 12 Barb. 217. See *Osterhout v. Rigney*, 98 N. Y. 222. To cause taxes illegally assessed to be repaid. *People v. Supervisors*, 36 How. 1; *People v. Supervisors*, 51 N. Y. 401. Mandamus will lie to compel supervisors to designate papers to publish session laws. *People v. Supervisors of Greene*, 13 Abb. N. C. 421.

The writ will not issue to compel a board of supervisors to disallow a bill already audited when certificate has been issued therefor and passed to third party and bill is for services actually rendered. The remedy is by *certiorari* in case audit was illegal. *People v. Supervisors of Greene*, 14 Abb. N. C. 29. Before the writ will lie to the board to assess against a town a judgment against a commissioner of highways, it must appear that it is a valid claim against the town. *People v. Auditors of Esopus*, 74 N. Y. 311; *People v. Supervisors of Ulster*, 93 id. 397. Where a resolution was illegally declared lost and the board adjourned, it was held that mandamus directing the board to reassemble was sufficiently served on chairman and clerk. *People v. Neilson*, 5 T. & C. 367. An adjournment of a board of supervisors without making an audit is a sufficient refusal to justify mandamus. *People v. Supervisors of Richmond*, 20 N. Y. 253. Mandamus will not lie to compel supervisors to audit and allow the expense of publishing the terms of court, although the publishing was ordered by a judge of the court. *People v. Supervisors of Greene*, 15 Abb. N. C. 447; *People v. Supervisors*, 39 Hun, 299. It is no valid reason for refusing writ against county canvassers that the assembly is judge as to the right of its own members to a seat. *People ex rel. Deuchler v. Canvassers of Wayne Co.*, 12 Abb. N. C. 78; S. C. 64 How. 334. The writ will lie to a board of supervisors to compel it to audit an account where it refuses to do so, on the ground that it has no power. *People ex rel. Anibal v. Supervisors of Fulton*, 53 Hun, 254, 6 Supp. 591. The writ will not lie to a board of supervisors to audit an account as a county charge, where it was shown to be a town and not a county charge. *People ex rel. McGrath v. Supervisors of Westchester*, 119 N. Y. 126.

Although a board of supervisors acts judicially in auditing claims, yet where no question of fact exists, and the amount of

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services rendered is undisputed and the rate of compensation established by law or by undisputed contract, the board cannot reduce the amount of such claim upon the ground that it is a quasi-judicial tribunal, and therefore mandamus will issue to compel the performance by the board of its duty in respect to the payment of such claim. *People ex rel. Morrison v. Supervisors of Hamilton*, 56 Hun, 459, 31 St. Rep. 473, 10 Supp. 88, affirmed, 127 N. Y. 654. A peremptory writ will not be issued to a board of supervisors to enforce a claim against the county where the question of the liability of the county therefor has not been determined. *People ex rel. Nichols v. Supervisors of Queens Co.*, 60 Hun, 387, 39 St. Rep. 863, 15 Supp. 461. Where a board of supervisors has considered the whole of an account upon its merits, and has in good faith exercised its judgment and rendered a decision as to what should be allowed, mandamus cannot thereafter issue to compel it again to audit the account and allow the claimant a greater sum. *People ex rel. O'Mara v. Supervisors of Cayuga*, 40 St. Rep. 238, 16 Supp. 254, affirmed, 43 St. Rep. 77. Mandamus will not lie to a board of supervisors to compel them to act under a law which is unconstitutional. *People ex rel. Pond v. Supervisors of Monroe County*, 47 St. Rep. 456, 19 Supp. 978, reversed on other grounds, 47 St. Rep. 702.

As to mandamus to board of supervisors under the "Reform Ballot Law," Laws 1890, chapter 262, as amended by Laws 1891, chapter 296, see *People ex rel. Hashbrouck v. Supervisors*, 135 N. Y. 522, 48 St. Rep. 533. Mandamus lies to a board of supervisors to compel it to provide for the payment of a judgment of the county court of sessions for costs on appeal in a bastardy proceeding rendered against a town liable for the support of its own poor. *People ex rel. Crouse v. Supervisors*, 70 Hun, 560, 53 St. Rep. 796, 24 Supp. 397. Mandamus will not lie to a board of supervisors requiring it to recognize the petitioner's right to a public office where there is a serious question in regard thereto, and another person is exercising the functions of the office. The remedy in such case is by *quo warranto*. *People ex rel. Rumph v. Supervisors*, 89 Hun, 38, 69 St. Rep. 386, 34 Supp. 1128.

Mandamus will not lie to supervisors to compel them to convene and audit a claim where the claim is not valid as against the town, though it may be valid against an officer of the town.

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People ex rel. Bevins v. Supervisors, 82 Hun, 298, 63 St. Rep. 577, 31 Supp. 248. Mandamus will not lie against a supervisor of a city to compel the issuance by a municipal corporation of bonds to pay for a public improvement, if it be apparent that a serious question will arise as to their validity. *People ex rel. Dady v. Supervisors*, 89 Hun, 241, 69 St. Rep. 448, 35 Supp. 91. See same case upon appeal, 6 App. Div. 225, reversed, 154 N. Y. 381. Mandamus will lie to compel supervisors to hear and determine whether services were rendered to the county by a justice of the peace, and if they were rendered, to audit the claim. If the board refused to audit, on the ground that the services were not rendered, the writ will not lie, but if they refused to audit merely on a question of law, the writ will lie. *Matter of Ramsdale v. Supervisors*, 8 App. Div. 550, 40 Supp. 840, reversing 16 Misc. 213, 38 Supp. 890. As the duty of a board of supervisors in relation to the designation of newspapers to publish laws is not absolutely ministerial and clerical, but involves to some extent judgment and discretion, mandamus will not lie to compel it to act in a particular manner in relation thereto. *Matter of Brown*, 19 Misc. 693.

Mandamus will lie to the treasurer of a county commanding him to receive forthwith money tendered by relator as assignee of a mortgage upon property sold for taxes, and to deliver a receipt for such payment, certifying that the same was in full redemption of the premises. *People ex rel. Maloney v. Edwards*, 56 Hun, 377. Mandamus will lie to a county treasurer to compel him to invest moneys received as taxes as required by law (proceedings under § 4, chapter 907, Laws 1869, as amended). *Spaulding v. Arnold*, 125 N. Y. 194, 34 St. Rep. 980. On a proceeding for mandamus against the supervisor of a town to compel the issuing of bonds in payment for work, where payment has been refused because the bonds had not been issued, the town treasurer and clerk, although required by law to sign the bonds, are not necessary parties. *People ex rel. Dady v. Supervisors*, 154 N. Y. 381, 48 N. E. Rep. 813. Where a bill has been withdrawn and no subsequent demand for its audit has been made, the claimant is not entitled to a mandamus to compel the board of supervisors to convene and audit the bill. *Peo. ex rel. Tripp v. Bd. of Supervisors of Cayuga Co.*, 22 Misc. 616, 50 Supp. 16, 84 St. R. 16.

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SUB. 5. WHEN GRANTED AGAINST TOWN AND VILLAGE OFFICERS.

The writ will run to president of a village to compel him to sign bonds authorized to be issued. *People v. White*, 54 Barb. 622. To a board of town auditors to assemble and audit relator's claim. *People v. Auditors of Welford*, 53 Barb. 555 ; S. C. affirmed, 38 How. (Ct. of App.) 23 ; *People v. Board of Audit*, 4 Hun, 94. If town auditors arbitrarily cut down *per diem* services allowed by law, it is no audit and mandamus will lie. *People v. Town Auditors*, 82 N. Y. 80. The writ will lie to the county treasurer to issue his warrant for the collection of a tax, and the collector to pay over moneys. *People v. Brown*, 55 N. Y. 180 ; *People v. Halsey*, 37 id. 344. To compel commissioners to pay money to bondholders. *People v. Mead*, 24 N. Y. 114. To enforce contract made by town auditors. *Richmond Gas Light Co. v. Town of Middletown*, 59 N. Y. 228. To compel commissioner of highway to work a road. *People v. Collins*, 19 Wend. 56. To open a road after decision on appeal. *People v. Champion*, 16 Johns. 61 ; *People v. Barber*, 12 Barb. 193 ; *People v. Commissioners*, 1 Cow. 23 ; *Ex parte Sanders*, id. 544. But see *People v. Commissioners*, 8 N. Y. 476. But not where it would compel them to trespass. *People v. Commissioners*, 27 Barb. 94 ; *Ex parte Clapper*, 3 Hill, 458. It will lie to compel them to complete record of the decision. *People v. Jefferds*, 2 Hun, 149. The writ may direct change of highways and taking lands for that purpose. *People v. R. R. Co.*, 58 N. Y. 152. A mandamus will not issue to compel commissioners of highways to ascertain, describe, and record what is claimed to be an old road ; it is for the commissioners to decide the fact, and it is beyond the competency of the court to dictate their decision ; it seems their decision may be reviewed. *People v. Hulsc*, 38 Hun, 388. The writ will lie to inspectors of election to compel them to register a voter. *Matter of Collins*, 64 How. 63 ; *People v. Payne*, 12 Abb. N. C. 103. The writ will lie to compel assessors to conform to order of county court. *People v. Supervisors*, 65 N. Y. 300. To ascertain whether consents for town bonding have been obtained, and if so, make necessary oath. *Howland v. Eldredge*, 43 N. Y. 457. To reduce an assessment when illegal. *People v. Olmstead*, 45 Barb. 644. But not where affidavits to procure reduction are not in form required by law. *People v. Supervisors*, 15 Barb. 607. Mandamus will lie to compel assessors to strike from the rolls non-residents illegally

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assessed. *People v. Assessors*, 44 Barb. 148. But not to compel assessors to make oath as required by statute where they have not assessed property at full value. *People v. Fowler*, 55 N. Y. 252. Court will not compel discretion of a board of education. *People v. Easton*, 13 Abb. (N. S.) 159. Nor to appoint a teacher nominated by trustees. *People v. Board of Education*, 2 Abb. (N. S.) 177. Nor to compel board to pay salary, nor to reinstate a teacher. *People v. Inspectors*, 44 How. 322 ; *People v. School Officers*, 18 Abb. 165. It will compel board of education to pay claim justly due. *Dannat v. Mayor*, 66 N. Y. 585. It will run to loan commissioners to compel them to pay over money. *People v. Cotes*, 1 How. 160. But not to review act of commanding officer in discharging private on surgeon's certificate. *In re Dederick*, 77 N. Y. 595. Nor to restore relator to roll of militia where case is not clear. *People v. Clark*, 54 How. 488. It will not lie to compel an overseer of the poor to prosecute actions for penalties. *People v. Leonard*, 74 N. Y. 443.

A town board will not be compelled by mandamus to decide in a particular way, when it concerns the exercise of a judicial function, though they can be compelled to determine the fact. *Matter of Abrams v. Board of Town Auditors*, 45 Hun, 272. Mandamus should not issue against a town board to compel it to audit and allow relator's claims where the absolute liability of the town for such claims is not established. *Peo. ex rel. Lane v. Case*, 46 St. Rep. 219, 19 Supp. 625. While a writ of mandamus will not lie to review the exercise of a power, judicial or discretionary, of a town board, or to direct what the result of its exercise shall be, yet where such board refuses to audit an account, on the ground that no consent or authority had been given to the relator to perform the services, and the matter turns upon the power given to the relator by a resolution of the board, the interpretation and effect of such resolution may properly be determined upon the hearing of a writ of mandamus. *Peo. ex rel. Slater v. Smith*, 83 Hun, 432, 64 St. Rep. 419, 31 Supp. 749. The writ will lie to commissioners appointed pursuant to Laws of 1892, chapter 493, providing for the construction of highways, to compel them to pay contractors by bond or by moneys received from the sale thereof as by statute provided. *Peo. ex rel. Pennell v. Treanor*, 15 App. Div. 509. Mandamus will lie to excise commissioners to compel them to decide a complaint, the

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evidence in regard to which has been presented to them, against a saloonkeeper charged with a violation of the statute forbidding the keeping open of a saloon on election day. Any citizen has a right to apply for the writ in such a case. *People ex rel. Welling v. Mcakin*, 56 Hun, 626, 24 Abb. N. C. 477, 10 Supp. 161, 31 St. Rep. 928.

SUB. 6. WHEN GRANTED AGAINST MUNICIPAL CORPORATIONS, CITY OFFICERS, AND BOARDS.

The writ will issue to the common council of a city compelling them to proceed in the matter of the widening of a street. *People v. Common Council of Brooklyn*, 22 Barb. 404. Also to compel common council to order an election to fill a vacancy. *People v. Common Council*, 77 N. Y. 503. But not to compel common council to confirm assessment of damages, there being another remedy. *People v. Brooklyn*, 1 Wend. 318. Nor to compel payment of expenses of opening street. *Bagley v. Green*, 1 Hun, 1. The writ will be awarded to compel the mayor to grant a license (*Ackley's Case*, 4 Abb. 35; *People v. Perry*, 13 Barb. 206), and to administer the oath of office to a person legally elected (*Ex parte Heath*, 3 Hill, 42; *Ackley's Case*, 4 Abb. 35); also to compel him to countersign a warrant. *People v. Opdyke*, 40 Barb. 306; *People v. Havemyer*, 3 Hun, 97; *People v. Havemyer*, 47 How. 494; *People v. Havemyer*, 16 Abb. (N. S.) 219. But not where the claimant is not entitled to his money. *People v. Tieman*, 30 Barb. 193; *People v. Booth*, 32 How. 17; *People v. Wood*, 13 Abb. 374. Where the proper authority has audited a claim, the comptroller and auditor may be directed to pay it. *People v. Earle*, 16 Abb. (N. S.) 64; *People v. Earle*, 47 How. 368; *People v. Earle*, 46 id. 308; *People v. Earle*, id. 267; *People v. Flagg*, 16 Barb. 503; *People v. Brennan*, 45 id. 457. It must, however, be a concededly valid claim. *People v. Board of Apportionment*, 3 Hun, 11, affirmed, 64 N. Y. 627. And there must be money in the treasury to meet it. *People v. Connolly*, 2 Abb. (N. S.) 315. But see *People v. Stout*, 23 Barb. 338; *People v. Haws*, 12 Abb. 192. But if the money has been wrongfully applied the writ will lie. *People v. Comptroller*, 77 N. Y. 45. But where the moneys sought to be reached have been paid to another claimant, and the fund to which it belonged is a special fund, mandamus will not lie. *People v. O'Keefe*, 100 N. Y. 572. It is held, however, in *People*

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v. *Board of Police*, 75 N. Y. 38 (distinguished, 96 id. 239, and 102 id. 18), that the treasurer of the board may be compelled by mandamus to draw on the comptroller for salary. See, also, *Swift v. Mayor*, 83 N. Y. 528. The writ has been issued to compel comptroller of New York city to pay salary to crier. *People v. Havemyer*, 47 How. 59. Mandamus lies to compel comptroller to pass on sufficiency of bonds of contractor. *People v. Green*, 50 How. 500, affirmed, 64 N. Y. 656. *Contra*, *Matter of Moore*, cited in 8 Abb. Dig. 200, in note referring to 72 N. Y. 496. Not granted to compel comptroller to pay if he denies validity of contract. *People v. Green*, 66 Barb. 630. Comptroller ordered to sign warrant in case under charter city of Troy ; see *People v. Crissey*, 91 N. Y. 616. The writ will issue to compel comptroller to pay deputy clerk of special sessions. *People v. Green*, 58 N. Y. 295. But not to issue warrant till auditor has examined. *People v. Green*, 56 N. Y. 476 ; *People v. Brennan*, 18 Abb. 100. The writ will be awarded to compel auditor to designate proper paper. *People v. Brennan*, 39 Barb. 651. The writ will issue to compel city clerk to affix seal to contract. *People v. Connolly*, 2 Abb. (N. S.) 315. Assessors of New York city have been compelled to determine damages for street improvements. *People v. Assessors*, 53 How. 280. It will also run to police board to compel them to restore a member of the force. *People v. Board of Police*, 35 Barb. 527. A trial and discharge are, however, judicial acts. *People v. Police Commissioners*, 12 Abb. (N. S.) 181. And the writ will not be granted where relator has given up his position. *People v. Board*, 26 N. Y. 316. It will not compel board to pay full salary to sick policeman. *People v. French*, 24 Hun, 263. It seems that if the commissioners of police should wrongfully dismiss a member of the force because of an alleged conviction of a crime he would have his remedy by mandamus for restoration. *People v. French*, 102 N. Y. 583. It will run against a city board of auditors. *People v. Green*, 44 How. 201. But will not interfere with their discretion. *People v. Board of Apportionment*, 52 N. Y. 224 ; *People v. Cooper*, 24 Hun, 337. Issuing of a permit to remove night-soil will not be compelled by mandamus. *Matter of Wessel*, 13 Week. Dig. 185. The department of public buildings, having once acted, will not be compelled to submit the question passed on to examiners or to act favorably to relator. *People v. Esterbrook*, 26 Hun, 401.

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The writ will issue to compel principal of a public school in New York city to prepare pay-roll and certify to its correctness. *Matter of Gleese*, 50 N. Y. Super. 473. The writ will not lie to the police commissioners of New York city to compel them to pay salary to a member of the police force who has been removed, the right to the office must be tried on *certiorari*. *People v. French*, N. Y. Daily Register, June 11, 1884. A mandamus has been held to lie to compel merchants to remove goods from sidewalks when placed there by permission of the common council. *People v. Mayor*, N. Y. Daily Register, April 23, 1884. The act being illegal, the writ runs against the municipality. Where a city violates a contract, and proof is necessary to ascertain the amount of damages, the remedy is by action and not by mandamus. It is questioned whether the writ would lie after judgment to compel levy of the amount due. *Utica Water Works Co. v. City of Utica*, 31 Hun, 426. Where a contractor is entitled to be awarded a contract and he has a remedy at law, mandamus will not lie. *People v. Thompson*, 99 N. Y. 641. A mandamus ought not to issue to compel the commissioner of public works to give a permit to erect columns in a street unless the relator has the absolute right so to do. *People v. Thompson*, 98 N. Y. 6. By chapter 496, Laws of 1886, mandamus is authorized upon refusal of board of excise to grant license in cities of over one hundred and fifty thousand inhabitants. The writ cannot be granted by the city court. *People v. Board of Excise*, 3 State Rep. 253. For decision under the act, see *People v. Becker*, 3 State Rep. 203, where alternative mandamus was granted.

Mandamus will not lie to the commissioner of public works of a city to compel him to give a permit for excavation in the public streets in favor of a railway corporation, where its charter does not give a clear legal right thereto. *People ex rel. Third Avenue R. R. Co. v. Newton*, 112 N. Y. 396, 21 St. Rep. 8, affirming 48 Hun, 477, reversing 14 St. Rep. 906. Mandamus will not lie to compel the mayor and municipal boards of a city to revoke a resolution of the common council granting permission to occupy the sidewalk with booths, where the common council were legally competent to pass the resolution. If the stand is used for legal purposes, it cannot be regarded as a nuisance or an unlawful obstruction of the streets.

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People ex rel. Meeks v. Mayor, etc., 1 Supp. 95. Mandamus will lie to the comptroller of a city to compel him to pay the quota of State taxes imposed upon a city, where it was his statutory duty so to do. *People v. Myers*, 50 Hun, 479, 20 St. Rep. 268, 3 Supp. 365, affirmed, 112 N. Y. 676. Mandamus lies against commissioner of public works of a city or civil service board, in favor of a veteran to enforce a preference given under Laws 1887, chapter 464. *Matter of Sullivan*, 55 Hun, 285. *People ex rel. Merritt v. Civil Service Board*, 13 App. Div. 309. Mandamus lies against the treasurer of a city to compel him to accept the face of and cancel certain taxes without interest, where the legislature has relieved the amount of an original tax which was void. *People ex rel. Flower v. Bleckwenn*, 55 Hun, 169, affirmed, 129 N. Y. 637.

Before applying for a mandamus to a board of education to compel the admission of a child to a ward school, the relator must have exhausted all other remedies ; it seems that such admission will not be compelled where there is no room to seat the child. *People ex rel. Ulrich v. Board of Education*, 4 Supp. 102.

Mandamus will lie to the trustees of common schools, to compel them to reinstate a teacher unlawfully discharged. *People ex rel. Stanley v. Van Sicken*, 43 Hun, 537. Mandamus lies to the commissioners of excise of a city to review their action in refusing a license, the right of such writ being given under Laws 1886, chapter 496. *People ex rel. Kruse v. Woodman*, 16 St. Rep. 715. A board of police will not be compelled by mandamus to retire a policeman and put him on the pension list where he sought to be retired for the purpose of evading trial and arraignment for misconduct. *People ex rel. Tuck v. French*, 108 N. Y. 105, affirming 44 Hun 24. Mandamus will not lie to police commissioners to enforce the excise law unless it appears that such officers do not intend to enforce the statute. *In re Whitney*, 3 Supp. 838, 24 St. Rep. 968. The writ will not lie to a commissioner of public works of a city directing him to remove obstructions from the street, where such obstructions are erected under color of legislative authority in a comparatively uninhabited part of the city and cause no apparent or substantial loss. *People ex rel. Lynch v. Manhattan Ry. Co.*, 20 Abb. N. C. 393. The writ lies to compel a commissioner of public works of a city to issue a permit to a railroad

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corporation to alter its system for moving cars where it is entitled to do so on complying with certain legislation. *Matter of Petition of T. A. R. R. Co.*, 121 N. Y. 536, reversing 56 Hun, 537. Mandamus will not lie against the mayor of the city to compel him to draw his warrant on a city treasurer in favor of a contractor, where it appears that there were other bids lower than those of the relator, and the municipal charter provided that contract work shall be let to the lowest bidder. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631.

Mandamus will not lie to a board of village trustees to compel them to fill an alleged vacancy in office where it is already occupied under color of title. *People ex rel. Wilson v. Village of Mt. Vernon*, 59 Hun, 204. Mandamus will not lie to police commissioners to require them to place the name of a widow of an officer upon the pension roll where it is a matter of discretion with the board. *People ex rel. Blied v. Martin*, 32 St. Rep. 440, affirmed, 131 N. Y. 196. Mandamus lies to compel the assessors of a city to correct clerical errors when the charter directs them so to do. *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515. The writ will not lie to a commissioner of public works of a city to compel the granting of a permit to the relator for the construction of an underground railroad, if the right thereto is not free from doubt and no reason is apparent why the rights of the relator should not be asserted by a regular action at law. *People ex rel. N. Y. U. R. Co. v. Newton*, 34 St. Rep. 584, 19 Civ. Pro. 416, 11 Supp. 782.

Mandamus will not lie to the common council of a city compelling it to declare a candidate elected when the question as to which person was elected is contested, and the common council under the city charter are judges as to such election. *Halloran v. Carter*, 35 St. Rep. 884, 13 Supp. 214. The writ will not lie to compel a registrar of deeds to receive satisfactions of mortgages and to discharge the same where the mortgages had not yet been paid and the petitioner was not the holder of any satisfaction piece; the reason for the refusal of the writ being that it sought to compel action of a public officer in case of the happening of some future event. *People ex rel. Sayles v. Fitzgerald*, 37 St. Rep. 540, 3 Supp. 663, affirmed without opinion, 128 N. Y. 620.

The writ will not lie to a board of education to compel the

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payment of the salary of a public school teacher who has been removed from office and subsequently reinstated. The most that such an one could require would be to have his name put upon the pay-rolls. He should be left to this action at law to enforce payment. *People ex rel. Steinson v. Board of Education*, 60 Hun, 486, 15 Supp. 308. Mandamus will not lie to compel a city officer to perform an act which will work a public and private mischief, or to compel compliance with the letter of the law in disregard of its spirit or in aid of a public fraud. *People ex rel. Wood v. Assessors*, 137 N. Y. 201, 50 St. Rep. 404.

Mandamus will lie to compel a city to complete its purchase after the approval of the tax for such purpose by the electors. *Weston v. City of Newburgh*, 67 Hun, 127, 51 St. Rep. 414, 22 Supp. 22. But compare *Peo. ex rel. Ryan v. Aldridge*, 83 Hun, 279, *post*. The writ will lie to a board of estimate and apportionment to compel it to examine the relator's claim against the city where it was authorized so to do by act of the legislature. The authority to audit it carried with it the duty, and is of a mandatory character. *People ex rel. Kellner v. The Mayor, etc.*, 3 Misc. 131. The writ will lie to a common council to compel the audit and payment of a claim against the city when the charter directs them so to do, even though the statute under which the award was made was repealed before the claim was audited. *People ex rel. Reynolds v. City of Buffalo*, 2 Misc. 7, 49 St. Rep. 576, 21 Supp. 601. Where the contracting board of a municipality is required by law to award a contract to the lowest bidder, and the person making the lowest bid has in all respects complied with the law, the board will be compelled by mandamus to award him the contract. *People ex rel. Matthews & Co. v. City of Buffalo*, 5 Misc. 36. Mandamus will not lie to the mayor of a city to compel him to initiate proceedings to remove an obstruction to the streets where he has a discretion in regard thereto. Such discretion is not affected by a resolution of the common council requesting the mayor to take such proceedings. *People ex rel. Wooster v. Maher*, 141 N. Y. 330, 57 St. Rep. 425.

Mandamus will not lie against the commissioner of city parks to compel the reinstatement of relator, he being an honorably discharged soldier, where he is guilty of laches in waiting over two years before instituting the proceeding. *Matter of Gaffney*, 84 Hun, 503, 66 St. Rep. 153, 32 Supp. 873. Mandamus is the

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proper remedy to secure the reinstatement of a veteran holding a position as clerk from which he can be discharged only for cause. *People ex rel. Drake v. Sutton*, 88 Hun, 173, 68 St. Rep. 494, 34 Supp. 487. In mandamus proceedings against the comptroller of a city, the court will not consider questions as to the propriety of items included in an award of damages made by commissioners authorized by law to ascertain the amount of damages to lands suffered by reason of changes in the grade of streets or avenues. *People ex rel. Purdy v. Fitch*, 147 N. Y. 355, reversing 87 Hun, 304, 68 St. Rep. 320.

Mandamus to the mayor of a city to compel the performance of a duty which rests in contract merely will not be granted. It would be in the nature of an action in equity for the specific performance of a contract. A municipality, no more than a private person, can be compelled to prosecute an enterprise beyond the point at which it sees fit to discontinue. The only remedy is by action for breach of contract. *People ex rel. Ryan v. Aldridge*, 83 Hun, 279, 64 St. Rep. 727, 31 Supp. 920. But compare *Weston v. City of Newburgh*, 67 Hun, 127, *supra*.

Mandamus will not lie to review the discretion of a board of education in dismissing a public school teacher. The remedy is by *certiorari*. *Jordan v. Board of Education*, 14 Misc. 119, 69 St. Rep. 622, 35 Supp. 247. While mandamus will issue to the officers of a city to compel the examination and audit of claims, yet it will not issue to direct the mayor to draw a certified warrant upon the treasury, where the duty involved the consideration of evidence upon the subject and the judicial determination of facts. *People ex rel. Kings County Gas Co. v. Schieren*, 89 Hun, 220, 35 Supp. 64, 69 St. Rep. 243. Where a contract for municipal improvements provides for its payment by issue of bonds, and the city treasurer refuses to issue them, mandamus will lie to compel him to do so on the relation of the contractor. *Sheehan v. Treasurer of Long Island City*, 11 Misc. 487, 67 St. Rep. 277, 33 Supp. 428. A peremptory writ of mandamus against a mayor and common council of a city to compel the reinstatement of relator to a public office will not lie where the question as to the abolition of the office in good faith by the municipality is raised, though an alternative writ should issue for the trial of such questions. *People ex rel. Corrigan v. Mayor*, 149 N. Y. 215.

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Mandamus will not lie to restore an honorably discharged veteran to a city office where another is holding by color of right, especially where there are questions of statutory construction involved which are not clear and unambiguous. *Matter of Hardy*, 17 Misc. 667. Where the mayor of a city refuses to make classifications of civil service positions as required by statute, or if he does it improperly, he may be compelled by mandamus, or in some cases by *certiorari*, to do his duty in this respect ; but a taxpayer's action to restrain the payment of salaries earned by appointee is not an appropriate remedy. *Chittenden v. Wurster*, 152 N. Y. 345, reversing 14 App. Div. 483.

The alternative writ is a proper means of determining whether the relator, an honorably discharged soldier, was performing the same duties as one not a soldier, where the relator has been discharged in violation of the statutory preference. *Matter of McCloskey v. Willis*, 15 App. Div. 594. The comptroller of a city will not be compelled by mandamus to pay a salary which he has already paid to one *de facto* in office under color of title. *Matter of Grady*, 15 App. Div. 504.

Mandamus lies to the commissioner of public works of a city to compel him to grant a permit to repair a vault under a sidewalk where such permit has been granted with the illegal condition that the relator pay a certain sum. The writ will compel the issuing of the permit without the condition of payment. *People ex rel. Ziegler v. Collis*, 17 App. Div. 449. Mandamus will not lie to officers of a city to compel them to restore a person to an office which has been abolished in good faith. *People ex rel. Linnekin v. Ennis*, 18 App. Div. 412. Where a question is raised as to whether a municipal office was abolished in good faith, only the alternative writ can issue and the relator should move promptly ; a delay of ten months requires explanation. *People ex rel. Vanderhoof v. Palmer*, 3 App. Div. 389. Mandamus will not lie to compel the city clerk to grant an auctioneer's license to a corporation, as the statute is not mandatory but simply gives him authority, and he has a right to exercise his discretion in acting upon the application and to refuse it where the associates in the corporation are not known to him. *Peo. ex rel. United Auctioneers v. Scully*, 23 Misc. 732, 53 Supp. 125, 87 St. Rep. 125. A mandamus will not lie to reinstate a fireman illegally retired and placed on the pension-roll,

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where he failed to complain of such retirement for two years, and his papers do not show whether he drew his pension during that time and whether the position had been filled. *Peo. ex rel. Shea v. Bryant*, 28 App. Div. 480, 51 Supp. 119, 85 St. Rep. 119.

SUB. 7. WHEN GRANTED AGAINST ELECTION OFFICERS.

This subject is treated more fully, and the statute is cited and precedents are given, under "Procedure Under Election Law."

Where there is reasonable ground to believe that the returns are not accurate, a mandamus will issue requiring county canvassers to remit such returns to the inspectors for such correction as they may see fit to make. *People ex rel. Sanderson v. Supervisors of Greene*, 12 Abb. N. C. 95. Canvassers at town meetings may be compelled by mandamus to canvass return. *People v. Schielllein*, 95 N. Y. 124. The writ will not lie to compel clerk of board to recognize relator as member of the board. *Matter of Gardner*, 68 N. Y. 467. Nor to compel the board to levy tax where there is right of action on town bonds. *Marsh v. Town of Little Valley*, 64 N. Y. 112. The writ will not lie to county canvassers to send back returns where there is no clerical error but a fraudulent alteration. *People v. Supervisors*, 58 How. 141. Nor to compel them to reassemble, having once acted. *People v. Supervisors*, 12 Barb. 217, distinguished, 95 N. Y. 133. But see, *contra*, *People v. Canvassers*, 64 How. 201. Under Laws 1880, chap. 460, mandamus issued to county canvassers in *People v. Canvassers of Wayne*, 12 Abb. N. C. 77, and *Kortz v. Canvassers of Greene*, *id.* 84-95.

As to the general power of the court over the canvass of votes, see *People ex rel. Russell v. Canvassers*, 20 Abb. N. C. 24, note.

The board of county canvassers will be compelled by mandamus to canvass the duplicate return of the inspectors of election filed with the county clerk, as required by Laws 1880, chap. 56, § 14, in the absence of the proper original. *People ex rel. Russell v. Canvassers*, 20 Abb. N. C. 19, 46 Hun, 390.

A peremptory mandamus will lie to inspectors of election to compel them to affix their signatures to election returns when it appears that they refuse so to do upon the ground that fraudulent votes were cast by persons who nevertheless had complied with the statutory tests ; inspectors of election are simply ministerial

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officers without discretionary power to reject a vote. *People ex rel. Stapleton v. Bell*, 119 N. Y. 175, affirming 54 Hun, 567.

Mandamus will not lie to a board of canvassers to compel it to omit from its canvass votes which are alleged to be feloniously substituted in the place of the true vote of the district, where it appears that no other return exists to be canvassed; yet, if there were two returns and the canvassers had determined to canvass the false instead of the true, the court might correct such error. *People ex rel. Gregg v. Board of Canvassers*, 54 Hun, 594. Mandamus will not lie to a board of canvassers to compel it to issue a certificate of election to one who has no right under the Constitution to hold the office. *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360, 41 St. Rep. 912. Mandamus lies to the State board of canvassers to compel it to reject and disregard a paper purporting to be a return of a board of canvassers, but which is not properly signed and certified, and does not give the results of a legal canvass, and to compel it to consider a proper return. *People ex rel. Daley v. Rice*, 129 N. Y. 449, 41 St. Rep. 938. Mandamus will lie to compel a county board of canvassers to send back to the inspectors for correction returns upon which the names of candidates are incorrectly given or misspelled; but the writ will not lie to compel the canvassers to canvass returns, when it is proven that such returns are illegal because of a violation of the statute by the inspectors in receiving and counting certain votes. *People ex rel. Munroe v. Bd. of Canvassers*, 129 N. Y. 469. Until the legal presumption that the State board of canvassers will perform its statutory duty is overcome, a peremptory mandamus will not lie. *People ex rel. Derby v. Rice*, 129 N. Y. 465.

A peremptory mandamus will not issue under Laws 1890, chap. 262, as amended, where there is a question whether an inspector of election or a watcher declared his belief that ballots were marked for the purpose of identification, though it seems that in such case an alternative writ might issue. *People ex rel. Bush v. McKenzie*, 66 Hun, 265, 49 St. Rep. 527, 21 Supp. 279.

A writ of mandamus to compel inspectors of election to correct the canvass by striking out votes given by women will not be granted, as the board of canvassers cannot exercise the high judicial function of passing upon the constitutionality of a statute. The writ will only lie to compel them to correct cler-

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ical errors, etc. *Matter of Woods*, 5 Misc. 575. Mandamus will lie to compel canvassers to send back to the inspectors for correction returns which do not show upon their face that any particular person received any votes whatsoever, and which do not contain a statement of the number of general ballots protested as being "marked for identification." *People ex rel. Ranton City of Syracuse*, 88 Hun, 203. Inspectors of election may be compelled to correct clerical errors, but the returns will not be sent back to them for a recount. *People ex rel. Noyes v. Bd. of Canvassers*, 126 N. Y. 392. Or for a new canvass where they have once made one. *People ex rel. Fisk v. Devermann*, 83 Hun, 181.

Boards of canvassers have no power to correct frauds or rectify mistakes other than clerical mistakes; their duty is simply to add together the statement of results filed with them by inspectors. *People ex rel. Blodgett v. Bd. of Canvassers of Coeymans*, 44 St. Rep. 738. A mandamus is proper to compel a board of county canvassers to refrain from canvassing irregular returns. *People ex rel. Russell v. Board*, 46 Hun, 390. Inspectors of election are mere ministerial officers, and if an applicant makes the required statement under the required oath or affirmation, his name must be added to the list of voters, and the inspectors have no discretion to refuse to add it. Where a voter offers his vote to the inspectors, and, if challenged, takes the proper oath, and after answering fully the questions touching his right to vote, offers to take the general oath, it is the absolute duty of the inspectors to receive his vote. If in such a case the inspectors refuse to take his vote, and he is a legal voter, he can compel them to take it by mandamus. If it appears from undisputed facts that he is not entitled to vote, the writ should not be granted. *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360 (at 372), citing *People v. Pease*, 27 N. Y. 45, *Goetcheus v. Mattheson*, 61 N. Y. 420; *People ex rel. Stapleton v. Bell*, 119 N. Y. 175.

In proceedings for mandamus requiring a recount and rejection of ballots marked objected to as marked for identification, the court may inspect the ballots, and in the exercise of its common-law jurisdiction direct their exclusion if found to be void under the statute on other grounds. *People ex rel. White v. Board of Aldermen*, 31 App. Div. 438, 52 Supp. 643, 86 St. Rep. 643.

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The Supreme Court has jurisdiction, in proceedings instituted under § 114 of the Election Law, to issue a mandamus to the board or body of canvassers or inspectors of election, requiring a recount of the vote upon which ballots marked "protested" and the reason therefor shall be excluded. *People ex rel. White v. Bd. of Aldermen*, 31 App. Div. 438, 52 Supp. 643, 86 St. Rep. 643.

An order of the appellate division determining a proceeding by mandamus to compel a recount and the allowance or rejection of ballots objected to as marked for identification or rejected as void is one finally deciding a special proceeding, and where only questions of law are involved is appealable, as of right, to the Court of Appeals, and in such case it is the duty of that court to examine the ballots and determine their validity. *Peo. ex rel. Feency v. Bd. of Canvassers Richmond Co.*, 156 N. Y. 36, 50 N. E. Rep. 425.

Mandamus will lie to compel a recanvass of ballots rejected at a town meeting on a separate vote under the Liquor Tax Law. *Peo. ex rel. Decker v. Parmelee*, 22 Misc. 380, 50 Supp. 451, 84 St. Rep. 451. The tally sheet is the original official record of the canvass which is controlling as to the result, and where the statements of the inspectors are attacked for fraud or mistake the inspectors may be required by mandamus to correct them in accordance with the tally sheets. *Matter of Stewart*, 155 N. Y. 545, 50 N. E. R. 51, affirming 24 App. Div. 201, 48 Supp. 957, 82 St. Rep. 957.

A tally sheet is an essential part of the canvass, and the inspectors may be compelled by mandamus to make their returns agree with the tally sheets. *Matter of Stewart*, 24 App. Div. 201, 48 Supp. 957, 82 St. Rep. 957.

SUB. 8. WHEN GRANTED AGAINST PRIVATE CORPORATIONS AND ASSOCIATIONS.

The writ will lie to corporations to compel them to act in the line of their duty, and in cases where they have no discretion as to the particular manner in which they shall act. *People v. Judges Dutchess Common Pleas*, 20 Wend. 658 ; *People v. Steele*, 1 Edm. 505. Where they have a discretion, the writ will simply put them in motion in the line of their duty. *People v. Collins*, 19 Wend. 56 ; *Fish v. Weatherwax*, 2 Johns. Cas. 215 ; *People v. Brennan*, 1 Abb. (N. S.) 184. A corporation will be compelled to hold an election. *People v. Albany Hospital*, 11 Abb. (N. S.) 4 ;

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People v. Cummings, 72 N. Y. 433. Mandamus is remedy to restore person to membership in benevolent corporation. *Doyle v. Benevolent Society*, 3 Hun, 361. To admit a member to a medical society. *People v. Medical Society of Erie*, 32 N. Y. 187. To compel a church to admit a member to the pulpit. *People v. Steele*, 1 Edm. 505. It will be granted to restore one to membership in a corporation from which he has been improperly expelled. *People v. Benevolent Society*, 3 Hun, 361 ; *People v. American Institute*, 44 How. 468 ; *People v. Benevolent Society*, 24 id. 216 ; *People v. Commercial Association*, 18 Abb. 271. But he must show a clear legal right. *People v. Underwriters*, 7 Hun, 248. It lies to compel railroad company to erect fences. *People v. Rochester, etc., R. R.*, 14 Hun, 371, affirmed, 76 N. Y. 294 ; *People v. Albany & Boston R. R.*, 7 id. 569. But not to compel a company to operate two lines of road where one would accommodate the public. *People v. Rome, etc., R. R. Co.*, 103 N. Y. 95. To compel corporation to supply gas. *People v. Manhattan Gas Co.*, 1 Abb. (N. S.) 404. It is held in *People v. Stevens*, 5 Hill, 616, that the writ will not lie to compel delivery of books. In *People v. Hines*, 10 Week. Dig. 88, this is held with the qualification, unless successor is concededly entitled to office. The writ will be granted to compel inspection of books of the corporation by officer or stockholder. *People v. Throop*, 12 Wend. 183 ; *People v. Pacific Mail*, 3 Abb. (N. S.) 364 ; *People v. Mott*, 1 How. 247 ; *Sage v. Lake Shore R. R.*, 16 Alb. L. J. 102, Ct. of App. ; *People v. Lake Shore, etc.*, 11 Hun, 1 ; 70 N. Y. 220. See 50 N. Y. Super. 456. Issued to compel officer of corporation who had lien on books to allow an inspection. *People v. German Hospital*, 8 Abb. N. C. 332. To compel corporation to correct certificate of death. *People v. Scheel*, 8 Abb. N. C. 342.

The writ lies to private corporations only where the duty concerned and attempted to be coerced is specific and plainly imposed upon the corporation. *People v. N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58, reversing 40 Hun, 57.

Mandamus lies to a telephone company to compel it to place its instruments in relator's office on his compliance with the usual terms and reasonable regulations. *People ex rel. Postal Telegraph Co. v. Hudson River Telegraph Co.*, 19 Abb. N. C. 466. Mandamus lies to a corporation to compel its officers to exhibit the stock book to a stockholder, and it is immaterial whether the

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transfer of stock to the relator was merely colorable or whether there were any consideration therefor, or what was the occasion for the transfer. *People ex rel. Harriman v. Paton*, 20 Abb. N. C. 172. Where a stockholder applies in person to inspect the stock book of a corporation and is refused, he is entitled to mandamus as an absolute right, but the demand must be by the stockholder ; demand by his attorney is insufficient. *People ex rel. McDonald v. U. S. Mercantile Rep. Co.*, 20 Abb. N. C. 192.

Mandamus lies to compel the rector of a church to give notice of the election of churchwardens and vestrymen. *St. Stephen Church Cases*, 25 Abb. N. C. 250. And it lies to the rector to compel him to join with the trustees in calling an election to fill vacancies, and in such case a referee may be appointed as inspector and judge of the qualification of electors and to see that the writ is fully obeyed. *St. Stephen Church Cases*, 25 Abb. N. C. 258. Mandamus will lie to the board of managers of a State asylum to compel them to make certificates as to material, etc., furnished under a contract, when payment upon the contract was to be made on the certificate. *People ex rel. Peck v. Board of Managers*, 28 St. Rep. 886, 8 Supp. 395. A writ lies to a mutual protective union to compel the restoration of a member expelled in violation of the by-laws, and in such case damages arising therefrom may be awarded. *People ex rel. Deverell v. M. M. P. Union*, 118 N. Y. 101, 27 St. Rep. 963. The writ will not lie to restore the relator to the office of manager of a corporation where his right thereto is doubtful. *People ex rel. Nicholl v. New York Infant Asylum*, 122 N. Y. 190, 33 St. Rep. 296. Mandamus will lie to a medical college to compel the giving of a degree to a student, who has complied with its terms, when it is unjustly refused. *People ex rel. Cecil v. Bellevue Hospital*, 60 Hun, 107, 38 St. Rep. 418, 14 Supp. 490, affirmed, 128 N. Y. 621. But mandamus will not lie to a medical college to compel the issue of a diploma to a student where the faculty have discretion in passing upon his qualifications and have passed upon them. *People ex rel. Jones v. N. Y., H. M. C. & H.*, 47 St. Rep. 395. Mandamus is not the proper remedy in the case of the removal of a college professor ; the remedy, if any, is by action for salary, or other emolument. *Peo. ex rel. Kelsey v. N. Y. Post Graduate Medical School & Hospital*, 29 App. Div. 244, 51 Supp. 420, 85 St. Rep. 420. Nor

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will it lie to a law school to compel the giving of a degree where the faculty has refused, in its discretion, so to do, though mandamus may compel the giving of a certificate of attendance. *People ex rel. O'Sullivan v. N. Y. Law School*, 68 Hun, 118, 52 St. Rep. 14, 22 Supp. 663.

Mandamus lies to a transfer agent of a foreign corporation to compel him to allow an inspection of the transfer books under chapter 688 of the Laws 1892. *People ex rel. Daniels v. Crawford*, 68 Hun, 547, 52 St. Rep. 476, 22 Supp. 1025.

But a peremptory writ will not issue to such agent of a foreign corporation where the affidavits show that the books are at the home office and not under his control. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 468, 68 St. Rep. 135, 34 Supp. 257.

Mandamus lies to a benevolent society compelling it to reinstate a member expelled without personal notice. *People ex rel. Grunwald v. I. O. Ahavas Israel*, 13 Misc. 426, 68 St. Rep. 404, 34 Supp. 675.

As to mandamus against New York Produce Exchange, see *In re Haebler v. N. Y. Produce Exchange*, 149 N. Y. 414, reversing 15 Misc. 42. As to mandamus to a benefit society upon the forfeiture of insurance therein by non-payment, see *People ex rel. Leerburger v. Mutual Reserve Life Association*, 15 Misc. 333, 73 St. Rep. 315, 37 Supp. 617. As to mandamus to compel a water company to furnish water to one cut off therefrom, see *Matter of McGrath*, 56 Hun, 76, 29 St. Rep. 704, 9 Supp. 168. As to whether the court has power by mandamus to compel arbitrators to perform their functions, query. *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310, 19 St. Rep. 75, 16 Civ. Pro. 83.

The Supreme Court has power by mandamus to compel the officers and directors of a corporation to permit the shareholders to inspect the books and papers of the corporation other than the transfer books. *Matter of Steinway*, 31 App. Div. 70, 52 Supp. 343, 86 St. Rep. 343.

Mandamus will not lie to compel a telephone company to place an instrument in the office of another telephone company and establish connections therewith, or to receive and transmit messages, but the remedy is by action. *Matter of Baldwinsville Telephone Co.*, 24 Misc. 221, 53 Supp. 574, 87 St. Rep. 574.

A peremptory mandamus cannot be granted to compel the

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commissioner of public works to permit the opening of a street by a street railway company, in order to make an authorized change of motive power to electricity, where the papers show disputed allegations and conclusions as to the necessity of the proposed excavation, the uses of the street and buildings, the feasibility of using the tracks of an existing electric railway company, damage to subterranean structures, and as to the possibility of obtaining the consents of property owners. *Matter of 42d St., M. & St. N. Ave. R. Co. v. Collis*, 24 Misc. 321, 53 Supp. 669, 87 St. Rep. 669.

Where a stockholder in mandamus proceedings to enforce his right to an inspection of the books and to take extracts therefrom, succeeds only as to a portion of the relief sought, he is not entitled to recover counsel fees, as the services rendered in attempting to enforce the relief granted cannot be separated from those rendered in respect to the relief which was denied. *Clason v. Nassau Ferry Co.*, 27 App. Div. 621, 50 Supp. 160, 84 St. Rep. 160, affirming 20 Misc. 315, 45 Supp. 675, 79 St. Rep. 675.

A mandamus will not be granted to compel a steam surface railroad to cause a street to be taken across its tracks, until the board of railroad commissioners has determined the manner of crossing. *People ex rel. City of Niagara Falls v. N. Y. C. & H. R. R. Co.*, 31 App. Div. 334, 52 Supp. 234, 86 St. Rep. 234.

The board of education may be required by mandamus to make a requisition for the payment of the bill of an attorney designated to act for it by a justice of the Supreme Court. *Peo. ex rel. Allison v. Bd. of Education*, 26 App. Div. 208, 49 Supp. 915, 83 St. Rep. 915.

SUB. 9. WHEN GRANTED TO CONTROL RIGHT TO PUBLIC OFFICE.

The writ was awarded to restore person to office. See *People v. Board of Police*, 35 Barb. 527, which was reversed, 26 N. Y. 316. The question is discussed in *People v. Board of Police*, 9 Abb. 257, and *People v. Stevens*, 5 Hill, 616. In the last case the writ was refused where another was in possession of the office claiming a right, although the contrary was held in *People v. Steele*, 2 Barb. 397, while in *People v. Board of Police*, *supra*, it was held the writ should not issue to restore one against whom cause for removal exists. Title to an office will not be tried on mandamus. *People v. Lane*, 55 N. Y. 217 ; *Matter of Gardner*, 68 id.

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467. Nor will an officer be restrained from action by mandamus. *People v. Ferris*, 76 N. Y. 326. See, as to the issuing of the writ to restore officer, *People v. Scrugham*, 20 Barb. 302 ; *People v. Mayor*, 3 Johns. Cas. 79 ; *People v. Dykeman*, 7 How. 124 ; *People v. Stephens*, 5 Hill, 616, note ; see, also, 5 Wait's Prac. 569. The writ will issue to compel selection of inspectors of election by police board. *People v. Wheeler*, 18 Hun, 540. It will issue to compel an election to fill vacancy in office of alderman, and fix date of election. *People v. Common Council*, 77 N. Y. 503, distinguished, 97 N. Y. 274. But there is no power to go behind election returns as in *quo warranto*. *People v. Supervisors*, 58 How. 141. The writ will not lie to compel corporation to elect a new officer in place of one not qualified. *Matter of Emet*, 7 Hun, 333. Mandamus will lie to compel an officer or appointing power to compel observance of statutory preference in appointment to public office, given to honorably discharged soldiers and sailors of the late war. *Matter of Wortman*, 22 Abb. N. C. 137, 2 Supp. 324. The statute is sufficiently comprehensive to embrace ordinary laborers, and does not limit employment of veterans to business positions, and mandamus lies in favor of a laborer to the commissioner of public works. *Sullivan v. Gilroy*, 55 Hun, 285, 28 St. Rep. 566, 8 Supp. 401. Where, however, an appointment has already been made, mandamus is not a proper remedy in favor of a veteran ; *held*, also, that the incumbent should be made a party. *People ex rel. Ballou v. Wendell*, 57 Hun, 362, 32 St. Rep. 129, 10 Supp. 587. But the writ will not lie to compel the appointment of a veteran where the appointing board has a discretion in judging of the qualification for office. *People ex rel. Lockwood v. Saratoga Spa*, 54 Hun, 16, 26 St. Rep. 54, 7 Supp. 125.

Mandamus will not lie against the incumbent of a public office occupying under color of legal title. The writ is not available for the admission of an adverse claimant, and may not be employed for trying the title to office. *Matter of Torney*, 7 Misc. 260, 57 St. Rep. 465, 23 Civ. Pro. 333, 27 Supp. 913 ; s. c. on appeal, 11 Misc. 291, 65 St. Rep. 452, 32 Supp. 277.

The writ will not lie to compel reinstatement to office on the ground that the relator is an honorably discharged Union soldier when he has waited eight months before making application for the writ, being guilty of laches. *People ex rel. Miller v. Justices of Sessions*, 78 Hun, 334, 60 St. Rep. 720, 29 Supp. 157. A delay

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of two years and nine months is such laches as will defeat the writ. *Matter of Gaffney*, 84 Hun, 503, 66 St. Rep. 153, 32 Supp. 873. So also is a delay of four months after discharge from office. *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 Supp. 698. *Matter of Vanderhof*, 15 Misc. 434, 72 St. Rep. 354, 36 Supp. 833.

When veteran volunteer firemen hold positions by appointment in a city for an indefinite time, they may compel reinstatement by mandamus, if removed from their positions without cause. The rule that the courts will not, at the instance of a person out of possession of office, try the title to office by mandamus, but will leave the party to the proceeding of *quo warranto*, has reference to public offices created by law, and is not applicable to clerks or employes unlawfully removed from their position by superiors. *People ex rel. Drake v. Sutton*, 88 Hun, 173, 68 St. Rep. 494, 34 Supp. 487. Yet the rule is well settled in this State, that mandamus will be refused to aid the admission of a claimant to an office already filled under color of law and when the title to it presents a disputable question. *People ex rel. Wren v. Goetting*, 133 N. Y. 569; *People ex rel. Lewis v. Brush*, 146 N. Y. 60, 65 St. Rep. 753, affirming 64 St. Rep. 139. To the same effect, see *People ex rel. Rumph v. Supervisors*, 89 Hun, 38, 69 St. Rep. 386, 34 Supp. 1128; *People ex rel. Wagner v. Trustees*, 17 Misc. 652; *Matter of Hardy*, 17 Misc. 667.

The writ will not lie to a board of education to compel the reinstatement of relator to the position of teacher in a public school, when the right thereto is not clear and another appointee occupies the place, and where the dismissal was the result of a trial which may not be reviewed upon mandamus. *Jordan v. Board of Education*, 14 Misc. 119, 35 Supp. 247.

Mandamus will not lie to compel reinstatement to an office where the head of the department has power by statute to discharge employes without assigning reasons therefor thirty days after appointment. *Sheridan v. Willis*, 6 App. Div. 132, 39 Supp. 884. Mandamus will not lie to compel a public officer to notify the civil service commission of certain vacancies in his department and to request a certification of names of those graded as available, in a case where the public officer has authority to determine the number of clerks and subordinates which he requires in his department. *People ex rel. Tregaskis v. Palmer*, 9 App. Div. 252.

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Mandamus to compel the reinstatement of a veteran to a public office will be refused where the return of the commissioner of public works shows that the relator was discharged solely for negligence, incompetence, and conduct not consistent with his position. Such return is conclusive. *People ex rel. Connor v. Brookfield*, 2 App. Div. 299, 73 St. Rep. 392, 37 Supp. 718.

Mandamus will lie to a civil service commission to compel the reinstatement of a relator's name on the list of eligibles when it has been removed therefrom solely on account of his advanced age and feeble physical condition. *People ex rel. Van Petten v. Cobb*, 13 App. Div. 56.

The general rule is that mandamus will not lie to determine the title to a public office. The title of one claiming a public office filled by another holding under color of right will not be determined in a mandamus proceeding where the question of title turns upon the construction of statutory provisions which are not entirely clear and unambiguous ; it seems that the appropriate remedy in such case is by information in the nature of a *quo warranto*. *People ex rel. Wren v. Goetting*, 133 N. Y. 569.

Mandamus will not be granted on the application of a claimant to a public office for the purpose of determining the validity of his claim where there is a serious question in regard thereto, and another person is exercising the functions of the office. *People ex rel. Lewis v. Brush*, 146 N. Y. 60, 65 St. Rep. 753 ; *People ex rel. Rumph v. Supervisors*, 89 Hun, 38, 69 St. Rep. 386, 34 Supp. 1128 ; *Peo. ex rel. Steingoetter v. Bd. of Canvassers of Erie*, 18 St. Rep. 799, 2 Supp. 561 ; *People ex rel. Wilson v. Village of Mt. Vernon*, 59 Hun, 204, 36 St. Rep. 318, 13 Supp. 447, affirmed, 128 N. Y. 657. The rule that mandamus will not issue to determine title to office holds even where it is a question as to title to office in an incorporated society. *People ex rel. Nicholl v. New York Infant Asylum*, 122 N. Y. 190, 33 St. Rep. 296.

A mandamus to appoint a person to an office should not be granted unless coupled with an application to remove the present incumbent. *People ex rel. Lockwood v. Trustees of Saratoga Springs*, 7 Supp. 125.

It is not the proper office of mandamus to restrain a party claiming to be a public officer from exercising the duties of the office or to enjoin one claiming to have been elected or appointed to such office from qualifying ; and apart from other considera-

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tions, the pendency of an action brought by the attorney-general in the nature of a *quo warranto* to determine the validity of a public office requires the denial of the petition for mandamus. *People ex rel. Requa v. Neubrand*, 32 App. Div. 49, 52 Supp. 280, 86 St. Rep. 280.

The fact that the relator, a veteran, claiming to be illegally discharged, asked to be reinstated to the position of elevatorman, when he was only entitled to be restored to the position of laborer, is not a ground for denying him the latter relief. *People ex rel. Broderick v. Morton*, 24 App. Div. 565, 49 Supp. 760.

Where the relator, a veteran, claims to be illegally discharged by the trustees and superintendent of public buildings, the fact that the Governor of the State, a member of such board, is named in the writ as an individual, does not prevent the proceeding, as the writ does not require him to do any act in his character as Governor, and it is not an attempt to interfere with the Executive Department of the State; nor will the court consider the question whether the writ will be enforced, as it is not presumed that State officials will refuse to obey the law. *People ex rel. Broderick v. Morton*, 24 App. Div. 566, 49 Supp. 760, reversed, 156 N. Y. 136.

A mandamus will not lie against the board of managers of a State hospital to compel the reinstatement of an employe where the superintendent of the hospital is alone empowered to appoint and discharge employes. *Matter of Porter v. Howland*, 24 Misc. 434; *sub nom. Porter v. Howland*, 53 Supp. 683, 87 St. Rep. 683.

A veteran who was appointed as an assessor under the Consolidation Act was entitled to serve during good behavior, and is entitled, under § 127 of the New York charter, to be retained as a member of the new board of assessors, and a failure to so retain him may be righted by mandamus. *Matter of Jacobus*, 24 Misc. 329; *sub nom. Jacobus v. Van Wyck*, 53 Supp. 71, 87 St. Rep. 71.

A proceeding by mandamus against the trustees of a public building to reinstate a veteran who has been discharged cannot, where the persons proceeded against go out of office pending the proceedings, be continued against their successors without notice or substitution of them. *Peo. ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. Rep. 791, reversing 24 App. Div. 563, 49 Supp. 760, 83 St. Rep. 760.

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Where appointments have been duly made from an eligible list furnished by the civil service commissioners, the remedy of a person whose name was omitted from the list by the mistake of the commissioners is not by mandamus to compel a cancellation of the appointments made and his own appointment to the place, but by a proceeding to test the title of the appointees. *Peo. ex rel. Mullen v. Sheffield*, 24 App. Div. 214, 48 Supp. 796, 82 St. Rep. 796. A delay of three years upon the part of a veteran in applying for a mandamus to compel his restoration to the position from which he has been removed constitutes such laches as precludes the granting of the application. *Peo. ex rel. Throckmorton v. McCartney*, 28 App. Div. 138, 50 Supp. 919, 84 St. Rep. 919. Mandamus will not lie to compel reinstatement of an officer where another has been appointed and is in possession of the office under color of right, but the remedy is by *quo warranto*. *Peo. ex rel. Brymer v. Scannel*, 22 Misc. 298, 49 Supp. 1096, 83 St. Rep. 1096.

SUB. 10. WHEN GRANTED IN MATTERS RELATING TO TAXATION.

Mandamus will lie to a State comptroller to compel him to hear and determine an application made by a purchaser of real estate, at a city tax sale, to cancel the sale and refund the purchase money, where such purchaser presents proof to show that the tax was invalid. *Peo. ex rel. Ostrander v. Chapin*, 105 N. Y. 309. But the writ will not lie to the comptroller to make any particular decision or to set aside a decision already made as to who is entitled to purchase money paid upon the invalid sale of land for taxes; and upon such proceedings the sufficiency of the evidence upon which the decision was based may not be reviewed *Peo. ex rel. Millard v. Chapin*, 104 N. Y. 96. Where a board of assessors has acted and rendered judgment in assessment proceedings, mandamus is not proper remedy to review the judgment; such review should be had by *certiorari*. *Peo. ex rel. Osborne v. Gilonn*, 24 Abb. N. C. 125, 30 St. Rep. 515, 9 Supp. 563, 18 Civ. Pro. 112.

Mandamus will lie to compel the comptroller of a city to issue and negotiate bonds in order to pay the State treasurer taxes which are owing from said city. *Matter of Attorney-General v. Myers*, 58 Hun, 218, 34 St. Rep. 284, 12 Supp. 754. The writ will lie to a county treasurer to compel him to invest money collected

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as taxes as provided by statute. *Spaulding v. Arnold*, 125 N. Y. 194, 34 St. Rep. 980. Mandamus will not lie to compel a collector of taxes to correct his books so as to conform to the apportionment in a case where there is fraud on the part of the relator. *Pco. ex rel. Wood v. Assessors*, 137 N. Y. 201, 50 St. Rep. 404.

The writ will not lie to a board of assessors to require them to correct the assessment rolls where they have no authority to do so. *Matter of Popoff*, 10 Misc. 272, 63 St. Rep. 438, 31 Supp. 2. The writ lies to assessors to compel them to strike out the assessment and taxes, and to restrain the collection thereof, where the property was included in the assessment by mistake. *Pco. ex rel. Nostrand v. Wilson*, 119 N. Y. 515. See in connection with mandamus relating to taxes, *Pco. ex rel. Flower v. Bleckwenn*, 55 Hun, 169.

Mandamus is a proper remedy to compel the registrar of arrears to receive unpaid taxes, and cancel a sale therefor, and a purchaser who has not received a conveyance is not a necessary party. *Pco. ex rel. Cooper v. Registrar of Arrears*, 114 N. Y. 19, 22 St. Rep. 158.

SUB. II. WHEN GRANTED TO COMPEL ACTION BY INFERIOR TRIBUNALS.

The writ may be granted to compel entry of judgment where inferior court cannot grant new trial. *Horne v. Barney*, 19 Johns. 247; *Haight v. Turner*, 2 id. 370; *People v. Justices of Chenango*, 1 Johns. Cas. 180. And to compel settlement of case by referee. *People v. Justices*, 20 Wend. 663; *People v. Baker*, 14 Abb. 19; *Sikes v. Ransom*, 6 Johns, 279; *Delavan v. Boardman*, 5 Wend. 132; *People v. Judges of Westchester*, 2 Johns. Cas. 117. But not in a particular way. *People v. Baker*, 14 Abb. 19. Justice of Marine Court to perform duty not official. *People v. Shea*, 7 Hun, 303. An alternative mandamus is proper to raise the question as to proper entry of order on decision of judge. *People v. Supervisors*, 9 Abb. 408. To compel police commissioners to allow a policeman on trial to have counsel. *Matter of Ryan*, 1 Law Bull. 81. To compel county judge to file decision when made. *People v. Dodge*, 5 How. 47. And to place on calendar an appeal prematurely dismissed. *People v. County Judge*, 13 How. 277; *People v. County Judge*, id. 398; *People v. Cortelyou*, 36 Barb. 164. To compel issue of warrant in summary proceedings on proper proof. *People v. Willis*, 5

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Abb. 205. To compel a subordinate court to give judgment, so writ of error can be brought. *People v. Stone*, 9 Wend. 182; *Ex parte Bostwick*, 1 Cow. 143. To compel a court to exercise statutory jurisdiction. *Matter of Hook*, 55 Barb. 257. To compel an inferior court to issue execution. *Cook v. Kirkland*, 2 How. 109; *People v. Gale*, 22 Barb. 502. The writ has been issued to inferior courts to compel them to set aside their orders. *People v. Judges*, 1 How. 109; *People v. Judges*, id. 111; *Matter of Application for Mandamus*, id. 200; *People v. Common Pleas*, 18 Wend. 234. The writ will not issue to compel a judge to change his decision on settling a case. *Tweed v. Davis*, 1 Hun, 252. Nor to correct error in dismissing appeal. *Ex parte Ostrander*, 1 Denio, 679. Nor any decision involving discretion. *People v. Judges*, 3 Cow. 39; *People v. N. Y. Sup. Ct.*, 19 Wend. 701; *People v. Marine Court*, 36 Barb. 341; *People v. Judges*, 18 Wend. 79; *People v. Tracy*, 1 How. 186; *People v. Baker*, 35 Barb. 105; *People v. Callahan*, 7 Daly, 434. As in case of opening surrogate's decree. *People v. Lott*, 42 Hun, 408. Nor to control the practice in inferior courts. *Ex parte Brown*, 5 Cow. 31; *People v. Common Pleas*, 2 How. 189; *Ex parte Chamberlain*, 4 Cow. 49. Nor to compel a court to allow an action to be removed to the United States court. *People v. Judges*, 2 Denio, 197. Nor to compel obedience to the order of another court. *Matter of Pond*, 11 How. 563. Nor to compel a court to vacate a rule in arrest of judgment. *Ex parte Bostwick*, 1 Cow. 143. Nor to compel a court to reverse a manifestly erroneous decision, as it is judicial and involves discretion. *People v. Judges*, 21 Wend. 20; *Ex parte Koon*, 1 Denio, 644; *Elkins v. Ahcarn*, 2 id. 291; *Ex parte Jacobs*, 1 id. 646; *Ex parte Baily*, 2 Cow. 479; *People v. Common Pleas*, 19 Wend. 113; *Ex parte Barrett*, 2 Cow. 458; *Ex parte Bacon*, 6 id. 392; *Ex parte Coster*, 7 id. 523; *People v. Judges*, 20 Wend. 658; *Gilbert v. Judges*, 3 Cow. 59. Writ was granted to compel superintendent of insurance department to pay over moneys. *Matter of N. A. Insurance Co.*, 8 N. Y. 152. Nor to a justice of a court where his time is occupied to compel him to entertain a particular case. *People v. McAdam*, 3 Civ. Pro. 396. In some of the above cases and others, the decision is also placed on the broad ground that the party has another adequate remedy.

“The judgment of an officer, court, or body charged with judi-

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cial functions cannot be coerced by mandamus. The most that can be accomplished by that writ is to compel such officer, court, or body to decide, leaving the decision to the free exercise of the judgment and conscience of the tribunal charged with the duty of deciding, and reserving to the party affected by such a decision the right to review the same by *certiorari* or appeal." Mayhem, P. J., in *Peo. ex rel. Woodward v. Rosendale*, 76 Hun, 107.

Inferior tribunals or a ministerial officer cannot be compelled by mandamus to decide a question in a particular manner, when the duties which are required to be performed are in their nature judicial, and all acts which depend upon the decision of a question of law or the ascertainment and determination of a fact are considered judicial. *Peo. ex rel. Kings Co. Gas Co. v. Schieren*, 89 Hun, 223, 69 St. Rep. 243, 35 Supp. 64.

Where a judicial body errs in its decision the remedy to review and to correct the same is by *certiorari*, not by mandamus. *Peo. ex rel. Bevins v. Sup'v'rs*, 82 Hun, 298, 63 St. Rep. 577, 31 Supp. 248.

Mandamus requiring a public officer to discharge an official duty, such as to abate a nuisance in a public street, will not be denied because there are thousands of similar nuisances which would require an army of employes and put the city to a heavy expense to remove them ; nor because the relator has a remedy against the individual maintaining the nuisance, unless it appears that the respondent by reason of the multitude of such applications actually made is without means or money to enforce the direction of the court. *Peo. ex rel. Mullen v. Newton*, 20 Abb. N. C. 387.

Mandamus will lie to an inferior court to compel the judges to pass sentence upon a defendant who has pleaded guilty, where they have suspended sentence after such a plea. *People ex rel. Benton v. Ct. of Sessions of Monroe Co.*, 46 St. Rep. 255, 19 Supp. 508, 8 Crim. R. 355.

It will lie to a justice of the district court of New York to make and file order in summary proceedings, and to issue a warrant for the possession of premises, in a case where he adjourned the proceedings without authority. *People ex rel. Allen v. Murray*, 2 Misc. 152, 50 St. Rep. 535, 23 Supp. 160, 23 Civ. Pro. 71.

It will lie to a police justice to require him to allow the complainant to be represented by counsel and to allow said counsel

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to act as prosecuting attorney in the absence of the district attorney on the preliminary hearing. *People ex rel. Howes v. Grady*, 66 Hun, 465, 50 St. Rep. 128, 21 Supp. 381, affirmed, 144 N. Y. 689.

But it will not lie to compel an inferior tribunal to decide an action or proceeding pending before it where such tribunal has already decided that it has no jurisdiction to entertain the same. *Matter of McBride*, 72 Hun, 394, 55 St. Rep. 487, 25 Supp. 431.

Nor will it lie to the justice of an inferior court to compel him to reinstate the relator to the position of court attendant as against an incumbent occupying under cover of a legal title, for *quo warranto* is the only proceeding for trying and judging the title to office. *Matter of Torney*, 7 Misc. 260, 57 St. Rep. 465, 27 Supp. 913, 23 Civ. Pro. 333.

Nor will it lie to the justice of an inferior court to reinstate the relator to the office of court attendant where he is guilty of laches. *People ex rel. Miller v. Justices of Sessions*, 78 Hun, 334, 60 St. Rep. 720, 29 Supp. 157.

Nor will it lie to the clerk of an inferior court to compel him to deliver to the relator papers filed with said clerk, where it has been decided by the judges of said court they should be filed with their clerk, and the decision has been acted upon for a number of years. *People ex rel. Gottchius v. McGoldrich*, 67 St. Rep. 289, 24 Civ. Pro. 292, 33 Supp. 441.

Nor will it lie to a police justice to require him to act where his jurisdiction is not exclusive. *People ex rel. Fellows v. Hogan*, 55 Hun, 391, 123 N. Y. 219.

ARTICLE II.

BY WHAT COURT WRIT MAY BE GRANTED. §§ 2068, 2069.

§ 2068. [Am'd, 1895.] **When writ granted at special term.**

Except where special provision therefor is otherwise made in this article, a writ of mandamus can be granted only at a Special Term of the Supreme Court, held within the judicial district, embracing the county, wherein an issue of fact, joined upon an alternative writ of mandamus, is triable, as prescribed in this article.

§ 2069. [Am'd, 1895.] **Id.; at term of the appellate division of the Supreme Court.**

A writ of mandamus may be granted, at a term of the appellate division of the Supreme Court only, directed generally to any judge holding, or to hold, a Special Term of the same court, or directed to one or more judges of the same court named therein, in any case where such a writ may be issued out of the Supreme Court,

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directed to any other court, or to a judge thereof. Such a writ can be granted only at a term of the appellate division of the judicial department embracing the county wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be enforced by the mandamus originated, unless that term is not in session; in which case it may be granted at a term of the appellate division of an adjoining judicial department.

The evident intent of § 2069 is to authorize the General Term to issue the writ where the action of a Special Term is to be affected, to prevent the anomaly of one Special Term granting the writ against another Special Term, or against one or more judges of the same or another court. It is probable that the "may" of this section in accordance with well-settled principles would be construed as "must" in case the aid of one Special Term was invoked against another and the matter sent to the General Term for action, not, however, as in any way binding the discretion of the General Term as to the granting of the writ.

The provisions of § 2068 as to application to a Special Term in the district embracing the county where the venue would be laid on an issue of fact on an alternative mandamus is a new one and establishes a different rule from that authorizing motions to be made in the county adjoining the district of the venue. It evidently overrules *People ex rel. v. Supervisors*, 2 Abb. (N. S.) 78, and *Mason v. Miller*, 7 Hun, 23, so far as they authorize the application out of the district. The superior courts have power to grant mandamus. *People ex rel. v. Green*, 58 N. Y. 295.

The power to issue the writ of mandamus was at common law lodged exclusively in the Court of King's Bench, because of the general superintendence it exercised over all inferior jurisdictions, and, unless conferred by statute, could be exercised by no other court in the realm. It was one of the prerogative writs, and, if any trace is to be found of an attempt by any other court to exercise the jurisdiction in the absence of a special statute conferring the authority, it was in the nature of a usurpation. *Audley v. May*, Poph. 176, 2 Blk. Com. 110, *Moses on Mandamus*, 16; *People ex rel. Ryan v. Green*, 58 N. Y. 296. The jurisdiction resided in the court and not in the individual judges, and the writ was issued in term and not in vacation. *People ex rel. Lower v. Donovan*, 29 Abb. (N. C.) 175.

Mandamus is a high prerogative remedy, known here as a State writ. The power to issue it in England resided exclusively in the Court of King's Bench until 1854, when it was vested in all

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the superior courts of the kingdom. At the first establishment of the judicial system in this State, this peculiar jurisdiction of the King's Bench was bestowed exclusively upon the Supreme Court, and in 1873 it was (following the precedent in England) conferred upon the "superior city courts of record." This term is used to distinguish between superior and inferior courts of record, that powers peculiar to the former may not be assumed by the latter, as of course. *People ex rel. McMahon v. The Board of Excise*, 3 St. Rep. 253.

Section 2069 contains the only provision which permits any tribunal, other than the Special Term of the Supreme Court, to grant the writ of mandamus. This section together with § 2068 are the only statutes conferring jurisdiction to issue the writ, and the jurisdiction thus conferred is exclusive. *People ex rel. Lower v. Donovan*, 135 N. Y. 81, 23 Civ. Pro. 9, reversing S. C. 63 Hun, 512, 45 St. Rep. 141, 18 Supp. 501.

An alternative writ of mandamus, except when special provision is otherwise made, can only be granted at Special Term, but it may be granted with or without notice, as the court thinks proper; where it was granted without notice it is properly granted at an adjourned term. *People ex rel. Village of Fulton v. Supervisors of Oswego*, 50 Hun, 105.

It seems that where a peremptory writ is applied for, which by its terms acts as a restraint to some direct action on the part of the board of canvassers, it is in the nature of an injunction, and the limitation imposed by § 605, Code Civil Procedure, providing that where injunction is issued to restrain State officers it should not be granted except by the Supreme Court at a General Term, applies also to such a writ of mandamus, and therefore it cannot be issued by a Special Term. *People ex rel. Derby v. Rice*, 129 N. Y. 464, 41 St. Rep. 938.

Mandamus granted at a Special Term can be granted only at a term of the court. *Peo. ex rel. Gaylord v. Supers. Schoharie County*, 40 St. Rep. 66, 15 Supp. 795. But an order directing issue of an alternative writ of mandamus may be granted at a properly adjourned Special Term, whenever the court so granting it holds that notice is not necessary; the court being empowered by § 2076 to grant the alternative writ either with or without notice, as it thinks proper. *Peo. ex rel. Fulton v. Supers. Oswego*, 50 Hun, 107, 19 St. Rep. 26, 15 Civ. Pro. 383, 3 Supp. 752. This

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power of a properly adjourned Special Term rests upon the fact that *ex parte* motions can of course be heard at terms adjourned to a judge's chambers, but as contested motions, requiring notice, cannot so be heard, at an adjourned term, it would seem to follow that, wherever notice is held to be necessary, the alternative writ cannot be granted at an adjourned term.

This section provides that, except where special provision is otherwise made, a writ of mandamus can be granted only at a Special Term of the Supreme Court held within the judicial district embracing the county wherein the issue of fact joined upon the alternative writ is triable; but § 2084 provides that such issue is triable in the county wherein it is alleged in the writ, that the material facts took place, unless the court directs it to be tried elsewhere. *Peo. v. Myers*, 50 Hun, 479, 20 St. Rep. 270, 3 Supp. 366, affirmed without opinion, 112 N. Y. 676. It therefore follows, that unless the court especially directs the issue to be tried elsewhere, the application for the writ must be made in the district embracing the county where the material facts took place. *People v. Myers*, 50 Hun, 482.

It seems that the district in which the application for mandamus should be made is dependent not upon the location of the office of the public official against whom the writ is issued, but rather upon the place where the material facts occurred which it might be necessary to determine upon the alternative writ. In other words, the proper place in which to make application is to be resolved by determining in what county or place the issue of facts joined upon an alternative writ of mandamus, if granted, would be triable, and the place where such issue would be triable is dependent upon the place where the material facts occurred. The court, however, without passing upon this question, merely suggested this to be its probable holding. *Peo. ex rel. Davenport v. Rice*, 68 Hun, 26, 52 St. Rep. 51.

A judge at chambers, however, has no jurisdiction either in the first judicial district, or elsewhere in the State, to issue a writ of mandamus. For, even though the application for a writ of mandamus is a motion, within § 760, and a judge out of court is permitted to hear motions in the first judicial district by § 770, yet, the writ of mandamus is taken out of the operation of these sections by the peremptory and unequivocal language of § 2068. *Peo. ex rel. Lower v. Donovan*, 135 N. Y. 80-82, 29

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Abb. N. C. 176, 47 St. Rep. 836, reversing 63 Hun, 512, 45 St. Rep. 141, 18 N. Y. Supp. 501. In this case the appeal was from an order of the General Term, adjudging the defendant guilty of contempt in disobeying an order of mandamus, issued on a day of general election by a judge at chambers, which mandamus required the defendant, an inspector of election in the first judicial district, to show cause why a peremptory writ of mandamus should not issue compelling him to permit the relator, an elector, to take the disability oath, etc., as provided by the Election Law. If mandamus cannot be so issued by a judge at chambers, there is no remedy to compel the reception of an elector's vote when it is refused. Yet the court says: "The voter who is refused the right to vote cannot resort to any court for relief until after his right is lost, as no court can entertain his application on election day. If an enlarged jurisdiction in these cases is expedient, the remedy is with the legislature."

A peremptory writ of mandamus cannot be granted at chambers. *Matter of Manning*, 71 Hun, 236, 24 Supp. 1039, 54 St. Rep. 562.

While § 2068 Code Civil Procedure provides, that a writ of mandamus can be granted only at a Special Term held within the judicial district embracing the county wherein the issue of fact joined upon an alternative writ of mandamus is triable; yet, it is no objection that the order to show cause why a peremptory writ of mandamus may not issue is granted at a Special Term out of the district embracing the proper county, if it is made returnable at a Special Term in the proper district. The court says: "If the application for mandamus itself is made within the proper district, I can see no objection to a judge of Special Term in any part of the State making the order to show cause for the purposes in question, provided it is made returnable at a Special Term held in the district embracing the county wherein the issue of fact joined upon an alternative writ of mandamus would be triable." *People ex rel. Crouse v. Sup'rs of Fulton Co.*, 70 Hun, 562, 53 St. Rep. 798, 24 Supp. 399.

The provisions of § 2068, that a writ of mandamus can be granted only at a Special Term, apply only to the original application for the writ, and the section does not limit the effect of § 1317 of the Code, and on appeal the appellate division may

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reverse, affirm, or modify the order. *People ex rel. Kavanaugh v. Grady*, 20 App. Div. 27.

In 1874, before the enactment of the present Code of Civil Procedure, it was held that Laws 1873, chap. 239, extending the jurisdiction of the Court of Common Pleas for the county of New York, and certain other courts therein named, empowered these courts to issue the writ of mandamus, as their jurisdiction was extended so as to be concurrent and co-extensive with that of the Supreme Court. *People ex rel. Ryan v. Green*, 58 N. Y. 295. But these courts are now abolished.

When an issue of fact upon an alternative writ of mandamus has been referred as provided for in § 2083, Code Civil Procedure, such referee is empowered to hear and determine the entire controversy between the parties, including the right to the peremptory writ of mandamus, notwithstanding the provisions of the Code directing that a writ should be issued either by a Special or a General Term of the Supreme Court. *Peo. ex rel. Krohn v. Miller*, 39 Hun, 559, 9 Civ. Pro. 149.

ARTICLE III.

ALTERNATIVE AND PEREMPTORY WRITS. § 2067.

§ 2067. Kinds of writ ; how alternative writ granted.

A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor ; and either with or without previous notice of the application, as the court thinks proper.

The question as to when either a notice of motion should be given, or order obtained to show cause why peremptory writ should not issue on the one hand, or an alternative writ be applied for and served at the outset, on the other, is a perplexing matter with practitioners, who must gather their information on the subject entirely from the books. However, the practice laid down in *Commercial Bank v. Canal Commissioners*, 10 Wend. 25 ; *People ex rel. v. Judges of Rensselaer*, 3 How. 164, and *People v. Board of Supervisors of Dutchess*, id. 379, gives very substantial aid on that point, and from those decisions and the current practice of the courts, familiar to those who have been accustomed to have recourse to this remedy, but somewhat perplexing to the

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young practitioner, it may be said, the alternative writ is not usually asked for in the first instance unless it is apparent that a question of fact requiring the intervention of the trial court will be necessary. In case of no immediate necessity for early action, the usual eight-day notice of motion is given for any Special Term in the district. In case time is essential, an order to show cause is obtained upon showing in the affidavit, which is the foundation of the writ, that it is necessary that the motion should be heard at an earlier date. The matter then comes up on the affidavits made, and of course served with the order to show cause, and in case no issue of fact is made, it becomes a question of law whether, upon the plaintiff's own showing, he is entitled to the writ, and in case he is so entitled, a peremptory writ issues directing the act to be performed, and on the order made, the writ issues. The only alternative to the defendant then is to perform the act and so return to the court. In that case very frequently no return is ever made, as the result sought to be attained is accomplished and the proceeding is abandoned, the relator having no further interest in pressing the matter. On the other hand, in case the defendant wishes to appeal, he applies for a stay of proceedings under § 2089, and no return is necessary, as the matter goes up for argument on the papers before the Special Term. A return is proper where the writ is obeyed, setting out that fact, as also a return may be filed showing the pendency of an appeal and stay thereon. So in case the writ is denied, the relator may appeal, and the matter comes up before the General Term as to whether or not the Special Term should issue the writ. But in case the facts are disputed by defendant, upon the coming on of the motion, a resort must be had to the alternative writ, and, as will be seen hereafter, that writ takes the form of a pleading to which an answer is interposed and the issue tried. It will be noticed in the older cases that doubt is thrown upon the right to appeal from an order denying the writ, and that it is suggested that the alternative writ be resorted to in such case; this is not now followed in practice, the appeal being taken, as before stated, from the order denying the motion for the writ; this question, however, is more appropriately treated under § 2078.

The Code of Civil Procedure follows the old practice and provides for two kinds of writ of mandamus, the peremptory writ

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and the alternative writ. Either of these may issue in the first instance, dependent upon whether an issue of fact is involved. (The procedure under each writ, and the circumstances which determine which of the two is proper, will be treated in detail in the following pages.) But it may be stated as a broad distinction, that the peremptory writ issues in the first instance only when there is no dispute as to the facts upon which the writ is asked for; in other words, when there is a question of law only, and the facts of the moving affidavit are admitted by defendant, and no other facts are set forth which would be a good defence by way of answer, if the relator's affidavit were considered as a complaint in an action at law. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 522; *People ex rel. Schwager v. Maclean*, 25 Abb. N. C. 471, Code of Civil Procedure, § 2070; *In re Haebler v. N. Y. Produce Exchange*, 149 N. Y. 418.

Issue of the peremptory writ in the first instance is preferable wherever it is proper, as the relief is speedy, while an alternative writ is only returnable twenty days after service, when the defendant answers or demurs, and the subsequent proceedings are the same as in an action. Code Civ. Proc. §§ 2072, 2076, 2079, 2082. With the peremptory writ, however, it is different. The defendant is brought into court on an eight days' notice that the court will be moved for a peremptory writ, or, in a proper case, by an order to show cause why the writ should not issue on short notice prescribed by the court issuing the order. On this motion for the peremptory writ, the practice in its broad lines is as follows: If, on the return day, the defendant raises no issue of fact, and if the right of the relator is sustained as a matter of law, the peremptory writ issues at once and in the first instance; but if a question of fact is raised on the hearing of the motion, an alternative writ issues instead of the peremptory writ demanded, and the questions of fact are subsequently tried. *People ex rel. Hartford Life Ins. Co. v. Fairman*, 91 N. Y. 386; *People ex rel. Daniels v. Crawford*, 68 Hun, 548; *People ex rel. Crouse v. Supervisors*, 70 Hun, 562.

Whenever there is a hearing upon an alternative writ, issued either in the first instance or upon the denial of a peremptory writ owing to a question of fact arising, a peremptory writ issues and is in the nature of a final judgment, upon the contentions of the relator in fact and in law being upheld upon such hearing.

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Thus it will be seen that there are in reality two peremptory writs: (1) the summary writ issued in the first instance upon notice of motion or order to show cause, where there is no question of fact and there is a clear right in the relator, and (2) as a final judgment upon the determination of an alternative writ.

The practical reason for resorting to the alternative writ only, when it is found necessary by reason of questions of fact being raised, is doubtless the greater ease and simplicity of the proceeding by motion for the peremptory writ, which only involves motion papers, and not the more complicated machinery of the alternative writ, which, when thus used, has only the effect of an order to show cause, unless in a special case some ulterior object is sought. A peremptory writ will usually be granted on the return of the order to show cause, if the relator's affidavits are not met or avoided where he has the legal right to relief. *People v. Assessors*, 52 How. 140; *Achley's Case*, 4 Abb. 35; *Ex parte Rogers*, 7 Cow. 526; *People ex rel. v. Throop*, 12 Wend. 183; *People ex rel. v. Supervisors*, 11 Abb. 114, affirmed, 3 Abb. Ct. App. Dec. 566; *People v. Supervisors*, 2 Keyes, 288; *People ex rel. v. Supervisors*, 64 N. Y. 600; see *People ex rel. v. Contracting Board*, 27 id. 378; *People v. Commissioners of Highway*, 6 Wend. 559; *People v. Commissioners of Highway*, 7 id. 475; *People v. Cayuga Common Pleas*, 10 id. 632; *People v. Beebe*, 1 Barb. 379; *People v. Brennan*, 39 id. 522. When opposing affidavits are read on application for the writ, conflicting with the moving affidavits, and the relator demands a peremptory writ, it is equivalent to a demurrer on his part, and the right to the writ must be determined on the assumption that the opposing affidavits are true. *People ex rel. v. Becker*, 3 State Rep. 202; *People v. Cromwell*, 102 N. Y. 477, reversing 38 Hun, 384. On the other hand, where the defendant proceeds to a hearing without traversing the averments of the moving affidavits, this is equivalent to a demurrer on his part, and the truth of plaintiff's averments is to be considered as admitted. *People ex rel. v. Supervisors of St. Lawrence*, 103 N. Y. 541. Where, according to well-settled rules of law, the relator is entitled on all the papers to all the relief asked for, the writ must issue in the first instance. It is sufficient that no defence appears on the papers. *People ex rel. v. Supervisors of Otsego*, 51 N. Y. 401. It has been held that on application for alternative writ, if the defendant does not show cause sufficient to prevent

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the issue of a peremptory writ, that writ may issue. *People v. Throop*, 12 Wend. 183; *Ex parte Jennings*, 6 Cow. 518. But a relator is not entitled to a peremptory writ if a material issue of fact is raised by affidavits. When the right to a writ depends on disputed questions of fact an alternative writ is proper. *People v. Becker*, 3 State Rep. 202. The peremptory writ will be awarded where the return to the alternative writ is insufficient or evasive. *Matter of Trustees of Williamsburg*, 1 Barb. 34; *People v. Seymour*, 6 Cow. 579; *People v. Collins*, 7 Johns. 549. Where argument has been had on application for a peremptory writ and decision made denying it, no request having been made to issue the alternative writ before the determination, a motion by relator to modify the order, so as to permit an alternative writ, is directed to the discretion of the court, and its decision is not reviewable by the Court of Appeals. *People ex rel. v. Wendell*, 71 N. Y. 171; *People ex rel. v. Fairman*, 91 id. 385; *People v. Board of Apportionment*, 64 id. 627. The peremptory writ will not issue except in case of clear unquestioned legal right. It should not be granted on a disputed claim or where its validity is controverted. In such case an alternative writ is proper. *People ex rel. v. Supervisors*, 64 N. Y. 600; *People ex rel. v. Wendell*, 71 id. 171. And this has been held in one case to be the rule in a case where the affidavits in opposition are evasive. *People v. Supervisors*, 5 Week. Dig. 538. On appeal from an order directing an attachment for a contempt in disobeying a mandamus, the court may direct a new peremptory writ to issue in such form as to meet the exigencies of the case. *People ex rel. v. Supervisors of Delaware*, 9 Abb. (N. S.) 408, affirmed, 45 N. Y. 196. On an application for the peremptory writ, the court will take the facts, so far as they are disputed, as they appear by defendant's affidavits. *People ex rel. v. Richards*, 99 N. Y. 620. In *People ex rel. v. Rome, etc., R. R. Co.*, 103 N. Y. 95, 3 State Rep. 39, it is held by the court, Earl, J., writing the opinion, that in determining whether a peremptory writ is properly issued, the court can consider only such facts alleged in the petition as are not denied or put in issue and the affirmative allegations on the part of the defendant in opposition to the writ. Where the material allegations of the application for the writ are put in issue, or where the answering affidavits contain allegations showing that a peremptory writ ought not to be issued, the court should award an alternative

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mandamus in the first instance in order that the issue of fact may be regularly tried before the proper tribunal. The order granting the writ may be entitled. *People v. Sage*, 2 How. 60.

A peremptory writ of mandamus can only be granted in the first instance in case the applicant's right thereto depends only upon questions of law. Upon a motion for a peremptory mandamus, if opposing affidavits are read which conflict with the moving affidavits, the right to the writ must be determined upon the assumption that the averments of the opposing affidavits are true, and if the relator desires to controvert or avoid the statements made in the opposing affidavits, he should take an alternative writ, so that the questions of fact can be tried. Under this rule the statements of the answering affidavits, in so far as they conflict with those served in behalf of the relator, must be regarded as true. *People ex rel. O'Sullivan v. New York Law School*, 68 Hun, 120, 22 Supp. 663, 52 St. Rep. 16; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 537; *People ex rel. Del Mar v. St. Louis & S. F. Ry. Co.*, 47 Hun, 544; *People ex rel. Sickels v. Becker*, 3 St. Rep. 206; *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 528, 48 St. Rep. 536; *People v. Supers. of Monroe*, 65 Hun, 296, 47 St. Rep. 480; *Matter of Kline*, 17 Misc. 675; *Matter of McDonald & Co.*, 16 Misc. 306; *People ex rel. Weed, Parsons & Co. v. Palmer*, 14 Misc. 42; *Matter of Loader*, 14 Misc. 213; *Matter of Loftus*, 41 St. Rep. 357, 16 Supp. 327; *Peo. ex rel. Lcerburger v. M. R. F. L. Assn.*, 15 Misc. 333, 73 St. Rep. 315; *Matter of Grady*, 15 App. Div. 506.

Martin, J., in *People ex rel. Corrigan v. The Mayor, etc.*, 149 N. Y. 223, thus summarizes the practice: "Section 2070 of the Code of Civil Procedure provides that a peremptory writ of mandamus may be issued in the first instance where the applicant's right to the mandamus depends only upon the questions of law, and the proper notice has been given; in every other case a peremptory writ cannot be issued until an alternative writ has been issued, served, and the return day therefor has elapsed. Where, upon motion for a mandamus, opposing affidavits are read which are in conflict with the averments of the affidavits of the relator, and notwithstanding this, the relator demands a peremptory writ, it is equivalent to a demurrer, and the question as to the right to the writ must be determined upon the assumption that the averments of the opposing affidavits are true." The court says

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further: "The only allegations contained in the relator's affidavit which are to be taken as true are the allegations of fact that are undisputed, and any allegation contained therein which is a mere conclusion of law should not be considered."

In determining whether the issuing of the peremptory writ is proper in the first instance, simply the facts alleged in the petition which are not denied or put in issue, and the affirmative allegations in the opposing affidavits, may be considered, and if the substantial allegations in the moving affidavits are not fully met, or avoided, a peremptory writ will be granted in the first instance as a general rule; but while uncontroverted statements of fact contained in the opposing affidavits must be taken as true for the purposes of the motion, yet this is not so in respect to mere conclusions or inferences therein averred. *Matter of Ramsdale v. Supervisors*, 8 App. Div. 553.

The peremptory writ can only be had upon motion where the applicant's right depends upon questions of law, and if the decision of any disputed question of fact should be necessary, the proper course is for the court to direct an alternative writ to issue, so that the defendant may make a return thereto, and so that the issue of fact raised upon that return can be tried by a jury. However, if the facts raised by the opposing affidavits involve only a question of law, such as the reasonableness of a regulation adopted by the State Commission of Lunacy, the matter will be determined as a question of law upon the motion, and evidence will not usually be received upon the question. But if the necessity and reasonableness of such a regulation should depend upon the existence of particular facts of which the court cannot take judicial notice, then the matter will be left to be decided as a question of fact upon proper evidence. *People ex rel. Croft v. Manhattan Hospital*, 5 App. Div. 249.

It has been held that the truth or falsity of the denials in the opposing affidavits cannot be inquired into so as to enable the court to issue a peremptory writ, although they may be inquired into so as to satisfy the court as to the propriety of granting an alternative writ; and for the purpose of issuing the peremptory writ in the first instance, the denials of a respondent cannot be regarded as sham, nor can they be disregarded because the preponderance of evidence seems to be with the relator. *People ex rel. Del Mar v. St. Louis & S. F. Ry. Co.*, 47 Hun, 545.

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Where the material allegations of the application for a writ are put in issue, or where the answering affidavits contain allegations showing that a peremptory writ ought not to be issued, the court should award an alternative mandamus in the first instance, in order that the issues of fact may be regularly tried before the proper tribunal. *People v. Rome, Watertown & Ogdensburg R. R. Co.*, 103 N. Y. 95.

While the writ can properly be granted only upon notice, if it is granted without notice and the defendant appears and without objection makes a return thereto, the objection is waived. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 532, 48 St. Rep. 536. It was held by the General Term that want of notice of the application for the peremptory writ of mandamus is sufficient to dismiss the proceeding. *People ex rel. Hasbrouck v. Bd. of Censors*, 45 St. Rep. 614, 18 Supp. 302.

While the alternative writ of mandamus may issue either with or without notice by § 2067 of the Code of Civil Procedure, the peremptory writ can issue only upon notice. Herrick, J., thus summarizes the present practice under mandamus: "A practice has grown up based upon the common-law practice of applying to the court or a judge in chambers upon petition or affidavit, for an order requiring the person, officer, or board to whom it is directed to do the thing asked for by the relator or to show cause at a Special Term why a mandamus should not issue compelling the person, officer, or board to do the thing specified in the order; then, upon the return day, if the thing has not been done and there is no dispute as to the facts, a peremptory mandamus is issued in the form required by the Code; if the facts are disputed, an alternative writ of mandamus is granted in the form and manner and returnable as prescribed by chapter 16, tit. 2, art. 4, of the Code of Civil Procedure. This practice is convenient. The order to show cause takes the place of and is in fact a notice, and in many instances results in bringing the controversy to a termination much quicker than if an alternative mandamus was issued in the first instance returnable in twenty days after the service thereof, as required by § 2072 of the Code. This practice enables parties to move promptly to obtain the relief they seek, it affords the party proceeded against an opportunity to comply with the demands of the relator if he has no defence in fact or law. . . . If, upon the hearing of such order to show cause,

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there is no dispute as to the facts, but simply a question of law, and a peremptory mandamus is issued, I think it comes within § 2070 of the Code, the order to show cause having fulfilled all the offices of, and being, in fact, a notice of, the application." *People ex rel. Crouse v. Supervisors*, 70 Hun, 562, 53 St. Rep. 798, 24 Supp. 399.

It has been held that upon the hearing of a motion for peremptory mandamus, the court, when desiring fuller information before proceeding, may order a reference to take proof of the facts alleged in the affidavits presented by the respondent, and direct that the persons making the same appear before the referee for examination. The object of this reference is to make more certain and reliable the unsatisfactory denials contained in answering affidavits, and thus to secure such information as will enable the court better to understand and dispose of the motion. *People ex rel. Del Mar v. St. Louis & S. F. Ry. Co.*, 44 Hun, 552, 19 Abb. N. C. 3; but it is not intended by this case to authorize a reference as to a disputed fact, it is only for the further information of the court. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 469, 68 St. Rep. 136, 34 Supp. 257.

The only allegations contained in the relator's affidavit which are to be taken as true are the allegations of fact that are undisputed, and any allegation contained therein which is a mere conclusion of law should not be considered. *People ex rel. Corrigan v. The Mayor*, 149 N. Y. 215. The writ will only issue where it is within the power of the person to whom the writ would issue to perform the act. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 469, 68 St. Rep. 136, 34 Supp. 257.

A peremptory writ of mandamus will issue in the first instance only where the applicant's right to it depends solely upon matters of law. When any matters of fact arises, the peremptory mandamus cannot be issued until an alternative writ has been issued and served, and the return day has elapsed. On the hearing of a peremptory writ the court can consider nothing except the statements in the moving affidavits which are not denied, and the facts set up in the answering affidavit. *In re Haebler v. N. Y. Produce Exchange*, 149 N. Y. 418; *Pco. ex rel. P. C. Savings Bank v. Cromwell*, 102 N. Y. 477.

The practice in reference to issuance of a peremptory writ is strictly defined by § 2070 of the Code, and must be pursued

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before the court can acquire jurisdiction to exercise this extraordinary power. *Pco. ex rel. Del Mar v. St. Louis & S. F. R. Co.*, 47 Hun, 544.

The requirements of the Code that a copy of the papers upon which the application is founded must be served with the order to show cause is a substantial one, as these papers are in the nature of a complaint to which the respondent is required to answer or demur upon the return day of the order, and hence must be served in order that the respondent may be apprised of their contents. Upon the hearing, the consideration of affidavits not served is error, if properly objected to, but if no objection be made the error will be deemed to have been waived. *Pco. ex rel. Del Mar v. St. Louis & S. F. R. Co.*, 47 Hun, 544.

Even where, under the circumstances, the denial of the peremptory writ and the issue of the alternative writ will result in a practical denial of the relief, owing to the delay incident to a trial; yet if the answering affidavits raise an issue of fact the alternative writ only can be granted. The court says: "If it be a defect in the law that the time for the trial of such issues may not be shortened by the court, the suggestion is only to be made to the legislature, not to the court." *Matter of Loader*, 14 Misc. 213, 35 Supp. 996. A peremptory writ issued without notice to the board of canvassers of election must be quashed under § 2070 of the Code, where no notice of the application for the writ has been given as required by such section. *Pco. v. Board of Sup. Dutchess Co.*, 18 Supp. 302.

It seems that even where a case has been made out authorizing a peremptory mandamus, the court may in its discretion issue an alternative writ instead. *Pco. ex rel. Slavin v. Wendell*, 71 N. Y. 172. Where, upon the hearing of a motion for a peremptory writ, the relator desires an alternative writ to issue, he must ask for it; otherwise it will be assumed that he is willing to take the chance of maintaining his right to a peremptory writ upon appeal, and does not desire an alternative writ. And he has no ground for complaint that the alternative writ was not granted. *Pco. ex rel. Slavin v. Wendell*, 71 N. Y. 172.

It has been held that, when the relator in a motion for a peremptory mandamus argues the questions involved by the conflicting affidavits, it is in the nature of a demurrer to the legal sufficiency of the opposing proof, and when that is done the

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alternative writ will not issue. *Peo. ex rel. Bush v. County Canvassers*, 66 Hun, 268, 49 St. Rep. 528, citing *Peo. ex rel. Hartford Life Ins. Co.*, 91 N. Y. 387.

The Code provides that notice of the application for a peremptory writ should be given to the respondent, and where no such notice has been given, and the respondents appear, make their return, and submit themselves to the jurisdiction of the court without objection, it is then too late for them to object that they have not received such notice. *Peo. ex rel. Hasbrouck v. Board of Sup.*, 135 N. Y. 522.

Positive allegations in moving affidavits are not put in issue by denials upon information or want of information in the answering affidavits, and in such cases the peremptory writ will issue. The court says, "That form of denial for the purpose of meeting the averments of a positive affidavit upon a special motion, really amounts to nothing. The Code has allowed it in the answer or reply in forming issues of a fact by way of pleading, but it has not been sanctioned or allowed for any other purpose. The applicant's affidavit may very well be literally true, and at the same time the person verifying the answer may have had no knowledge or information whatever upon the subject. For that reason the answer does not tend to discredit the statements made in the affidavit, and it must therefore be taken to be presumptively correct as to the applicant's title." *Peo. ex rel. Harriman v. Paton*, 5 Supp. 314, 20 Abb. N. C. 195. The rule that the peremptory writ will not issue if there is a question of fact, has been held even where the affidavits of the respondent are very evasive. *Peo. ex rel. Board of Sup. of Albany*, 5 Weekly Dig. 538. But it is held that the opposing affidavits must raise issues of fact fairly within the rules of procedure and pleading, in order to compel the issuance of an alternative writ, and a denial of a peremptory writ in the first instance; and so where the denials of the respondent's affidavits are open to objection because of their general and indefinite character, they will be disregarded and the peremptory writ will issue. *Matter of Freel*, 89 Hun, 81; 35 Supp. 59, 69 St. Rep. 271.

Likewise, on the application for mandamus to compel the reinstatement of relator, on the ground that he was a veteran, the affidavit of the respondent that he was informed that the relator

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was not a veteran raises no issue of fact where the relator's certificate of discharge was set forth in the moving affidavits, and there was no denial of its validity. *Peo. ex rel. Drake v. Sutton*, 88 Hun, 175, 34 Supp. 487.

In a case where an alternative writ would ordinarily be required, the parties, by agreeing to a statement of facts, may proceed thereon by motion for a peremptory writ. See *Peo. ex rel. v. N. Y., L. E. & W. R. R. Co.*, 47 Hun, 43, disapproved, 24 Abb. N. C. 161. But on the application for a peremptory writ in the first instance the denials of the defendant cannot be regarded as sham, nor can they be disregarded because the preponderance of evidence seems to be with the relator, and only an alternative writ can issue. *Peo. ex rel. Del Mar v. St. Louis, etc., Co.*, 47 Hun, 543.

When the relator applied for mandamus to reinstate him to a public position, on the ground that he was a veteran, it was held that respondent's affidavit stating that relator was discharged for failure properly to attend to his duties raised an issue of fact, and the alternative writ only could issue. *Peo. ex rel. Curtin v. Board of Education of Brooklyn*, 41 St. Rep. 791, 16 Supp. 676. When the relator takes a peremptory writ in the first instance, all the allegations in the answering affidavits are to be taken as true, and therefore it was held to be error for a peremptory writ to issue, directing the payment of a \$1,075 claim when the answering affidavits stated that the services were not worth more than \$600. *Peo. ex rel. McGovern v. Trustees of Penn Yann*, 2 App. Div. 32, 73 St. Rep. 151, 37 Supp. 535, affirmed, 153 N. Y. 643. On the application for a peremptory writ, the contents of opposing affidavits which are objected to as not giving legal reasons for a denial of the writ must be accepted as true. *Peo. ex rel. Buffalo Paving Co. v. Mooney*, 4 App. Div. 557, 73 St. Rep. 652, 38 Supp. 495.

Where one seeks by mandamus to be reinstated to a position which has been abolished, the question whether such position was in good faith abolished, or whether its abolition was colorable only, is a question of fact, and a peremptory writ will be denied; in such case the alternative writ should issue. *Peo. ex rel. Vanderhoff v. Palmer*, 3 App. Div. 389, 38 Supp. 651. A peremptory writ can only be granted in the first instance to obtain decision of questions of law and never where there is a

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dispute as to material facts, or where two opposite inferences may be drawn from evidence offered. *People ex rel. Kelsey v. New York Medical School*, 29 App. Div. 245, 51 Supp. 420. Where the relator proceeds upon his petition and the opposing affidavits and demands a peremptory mandamus, the proceeding is in the nature of a demurrer to the facts set up in such affidavits, and the right to the writ must be determined on the assumption that the averments of the opposing affidavits are true. *Peo. ex rel. City of Buffalo v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 570, 51 N. E. Rep. 312.

On a motion for a writ of peremptory mandamus, allegations in the moving affidavits which are denied by the opposing affidavits are to be considered as not proven. *Peo. ex rel. Lee v. Gleeson*, 32 App. Div. 358, 53 Supp. 7, 87 St. Rep. 7. The relator, who had been expelled from a membership corporation, and brings mandamus for reinstatement, is entitled on the trial of the issues to have submitted to the jury the question whether he has been given a reasonable notice to defend himself upon the charges upon which he was expelled. *People ex rel. Ward v. Uptown Association*, 26 App. Div. 299, 49 Supp. 81.

A question of fact is raised on an application for a peremptory writ to compel the transfer agent of a foreign corporation to exhibit the transfer book to a stockholder, when the transfer agent denies that he was such; in such case the alternative writ must issue. *Peo. ex rel. Daniels v. Crawford*, 68 Hun, 547, 22 Supp. 1025. Where the defendant's affidavits merely state the affiant's ignorance of facts, positively alleged in the petition for a peremptory writ, the allegations of such petition are not put in issue, and a peremptory writ should issue. *Peo. ex rel. Adibal v. Bd. of Suprs.*, 6 Supp. 591.

On an application for a peremptory writ to allow the relator access to the defendant's books, it was held that when the affidavit of the defendant's officer merely averred that he had been advised that the relator was not the owner of the stock mentioned in the latter's affidavit, but nowhere denied in terms that such shares were in fact the property of the relator, that the averments were evasive, and not sufficient to put the applicant's right of inspection in issue. *Martin v. Johnston Co.*, 17 Supp. 133. The court will not determine upon affidavits, questions of fact, which tend to show the validity or invalidity of the resolution

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authorizing the act which is sought to be coerced. In such case, the peremptory writ will be refused. *St. Stephen Church Cases*, 25 Abb. N. C. 241. The peremptory writ will not issue in the first instance, unless it appears that the applicant has a clear and unquestioned legal right to the relief. *Peo. ex rel. Schwager v. MacLean*, 25 Abb. N. C. 470. Even where, under the circumstances, the denial of the peremptory writ will make the remedy unavailing, it will not issue where a question of fact is raised, but the relator can only have the alternative writ. *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 470, 68 St. Rep. 135, 34 Supp. 257.

ARTICLE IV.

 PEREMPTORY WRIT AND RETURN THERETO. §§ 2070, 2072,
2075, 2073, 2074.

SUB. 1. PARTIES. § 2070.

2. PETITION OR AFFIDAVIT.

3. THE WRIT AND PRACTICE ON MOVING THEREFOR.

4. THE RETURN. §§ 2072, 2075, 2073, 2074.

SUB. 1. PARTIES.

 § 2070. (Am'd, 1895.) When peremptory mandamus to issue
in first instance.

A peremptory writ of mandamus may be issued, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed. The notice must be served, at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause, made, where the application is to the Special Term, by the court, or a judge thereof; or where the application is to the appellate division, by the appellate division, or a justice appellate division of that judicial department. In such a case the application must be founded upon affidavits, or other written proofs, a copy of which must be served with the notice, or order to show cause. Where the court, board, or other body to be served, consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served, as prescribed in the next section for service of an alternative writ of mandamus. Except as prescribed in this section, or by special provision of law, a peremptory mandamus cannot be issued, until an alternative mandamus has been issued and duly served, and the return day thereof has elapsed.

The attorney-general may bring the writ on behalf of the State where a corporation neglects its public duties. *People v. N. Y. C. & H. R. R. R. Co.*, 3 Civ. Pro. 11. In matters of private or corporate right, the title of the relator to the right must ap-

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pear; in matters of public right any citizen may be relator. *People v. Collins*, 19 Wend. 56. The writ may be applied for jointly by parties having a common interest, and the chief officers of a city or town may be joined as relators. *People v. Supervisors of Ontario*, 85 N. Y. 324; *People v. Supervisors of Ulster*, 17 Week. Dig. 138. Where a town was bonded for a railroad on condition that a depot should be maintained at a certain place, the agreement must be enforced by the town and cannot be enforced by a proceeding instituted by the attorney-general on behalf of the State. *People v. Rome, etc., R. R. Co.*, 103 N. Y. 95. In cases where the interest is common to the whole community, it is not necessary that the relator show an individual right, any person interested in the enforcement of a statutory right may be relator. *People v. Supervisors*, 17 Hun, 501; s. c. 85 N. Y. 324; *People v. Halsey*, 37 id. 344; *People v. Supervisors*, 56 id. 249; *People v. Asten*, 62 id. 623; *People v. Common Council*, 20 How. 401; see *People v. Common Council*, 20 Alb. L. J. 269, Ct. of App.; s. c. 78 N. Y. 33; *People v. Tracy*, 1 How. 186. It was held, however, in *People v. Hoyt*, 66 N. Y. 606, that a resident and taxpayer could not compel assessors to perform their duty by mandamus.

When mandamus is issued to a municipal board which is not incorporated, the individuals who compose the board should be designated as respondents, and not the board itself. *People ex rel. v. Ryan Civil Service Boards of N. Y.*, 17 Abb. N. C. 64, 3 How. N. S. 40. Any citizen may act as relator in mandamus proceedings issued against a board of excise, compelling them to proceed against a saloonkeeper charged with the violation of the statute forbidding the keeping open of saloons on election day. *People ex rel. Welling v. Meakim*, 56 Hun, 628.

A purchaser at a tax sale who has not received a conveyance is not a necessary party to proceedings by mandamus against the registrar to compel him to receive taxes and cancel the sale. *People ex rel. Coopers v. Registrar of Arrears*, 114 N. Y. 22. A purchaser at a tax sale is not a necessary party to a proceeding by mandamus to compel a county clerk to record a deed or satisfaction piece affecting the title. *Matter of Application of Clementi v. Jackson*, 92 N. Y. 591.

A writ of mandamus to the superintendent of public works to award a contract to the relator, who has bid thereon, will not be

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issued in a case where the successful bidder to whom the contract has already been awarded is not made a party to the proceeding. *Matter of Hilton Bridge Construction Co.*, 13 App. Div. 29. The portions of § 452, Code of Civil Procedure, which requires the court in certain cases to direct other parties to be brought in, relates to actions and judgments, and has no application to mandamus, which is a special proceeding. Thus, where a candidate at a general election has a proceeding for a mandamus against a board of canvassers, the opposing candidate is not a proper party. *Steingotter v. Board Canvassers Eric Co.*, 18 St. Rep. 799. But it has been held that where a candidate for election was proceeding by mandamus under the Reform Ballot Law, § 31, Laws 1890, chap. 262, that the opposing candidate should be permitted to intervene so as to protect his rights. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 528.

Where a mandamus has issued, a third person aggrieved thereby is not entitled to be made a party to the proceeding. *Matter of Bohnet*, 8 App. Div. 293, appeal dismissed, 150 N. Y. 279, the court holding that while the court had power to open the proceedings and allow the appellant to be brought in as a party, yet it was a matter which rested in its sound discretion. In proceedings by mandamus against a board of assessors, requiring them to rectify errors, the collector of taxes is properly joined in the proceeding in order to restrain him from collecting the illegal tax. *People ex rel. Nostrand v. Wilson*, 119 N. Y. 518. In a proceeding by mandamus against a board of officers not incorporated, the individuals who compose the board should be made respondents in an application for mandamus to compel their official action, but it seems that an error in making the board respondent instead of the individuals composing it, may be cured by amendment. *People ex rel. Ryan v. Civil Service, etc.*, 17 Abb. N. C. 77.

As the mayor, aldermen, and commonalty of the city of New York owe to the State no duty in respect to the payment of a tax, it would be error for the attorney-general to make them parties to a proceeding by mandamus against the comptroller of said city, nor are they entitled to be made parties on their own request. *People v. Myers*, 20 St. Rep. 272, 50 Hun, 479, affirmed, 112 N. Y. 676.

Mandamus will not lie against a foreign corporation except

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in so far as it is specially authorized by statute; *i. e.* it will not lie against a foreign corporation as such, but only against its transfer agent to compel him to show the books, for the agent only is thus amenable under Laws 1842, chap. 165. *People ex rel. Field v. N. P. R. R. Co.*, 18 J. & S. 546; *People ex rel. Hatch v. L. S. & M. S. R. R. Co.*, 11 Hun, 4. When it is uncertain which of two officials is the proper respondent in mandamus and both of them appear to be authorized to do the acts required to be done, the writ may be directed to both of them as respondents. *People ex rel. Harriman v. Paton*, 20 Abb. N. C. 199. In general, the writ lies to the person or body whose legal duty it is to perform the required act, as where a corporation is required by law to do a particular act, the mandamus is addressed to that organ of the corporation which is to perform it. It lies to the body upon whom the duty of "putting the necessary machinery in motion" is imposed. *People ex rel. Market Commissioners v. Common Council*, 3 Abb. Ct. of App. Dec. 506; s. c. 3 Keyes, 86; *People ex rel. v. Throop*, 12 Wend. 183.

It has been held that a mandamus will be issued against an official without regard to the expiration of his office; that the proceeding is against the respondent as an official, not personally, and his successor must obey the writ. *People ex rel. Case v. Collins*, 19 Wend. 58. But it has been held that a commissioner of highways elect cannot be substituted as successor in office in proceedings by mandamus had against his predecessor. *People ex rel. Van Valkenburg v. Commissioners of Highways*, 3 How. Pr. 56 (Special Term, 1847); see, also, *People ex rel. Twenty-Third St. R. R. Co. v. Squire*, 110 N. Y. 666. Though it is held that any change in the personnel of a board to which mandamus has been issued may be disregarded. *People ex rel. Slater v. Smith*, 83 Hun, 437. A person acting solely for the benefit of others, and with no personal interest, is not a proper relator in mandamus. *People ex rel. Simon v. Mayor*, 20 Misc. 190. As to the joinder of parties as relators, see *People ex rel. v. Supervisors of Ulster*, 17 Weekly Dig. 139. When the application for the writ of mandamus is made to secure some personal or private redress, the relator or applicant must be shown to have a personal right in obtaining it before the writ can be directed to issue, but where the act sought to be performed affects the public interests generally and all citizens are equally concerned in securing its performance, any citizen, a

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taxpayer, has a right, by virtue of his interest in the maintenance of the government, to institute proceeding by mandamus. *People ex rel. Wright v. Common Council of Buffalo*, 16 Abb. N. C. 116. The court says: "The authorities in this and several other States, and those also of the Court of King's Bench in England, have gone very far in supporting this proposition. In fact, the utmost limit of judicial interference has been reached for the purpose of sustaining the right of private persons to insist upon the performance of public duties by public officers." *People ex rel. Case v. Collins*, 19 Wend. 58. Thus any citizen of a village may have mandamus to compel the trustees to appoint and organize a board of health when they are required so to do by statute. *People ex rel. Boltzer v. Daly*, 37 Hun, 466.

Prior to the case of *People ex rel. Case v. Collins*, 19 Wend. 64, *supra*, there was no settled practice in this State on this subject, and the rule there adopted, though differing from that which prevails in many of the other States, is a reasonable one, and in many instances actually necessary to obtain speedy redress for wrongs affecting the public interest. *People ex rel. Stephens v. Halsey*, 37 N. Y. 347.

Upon the refusal of a county treasurer to issue his warrant for the collection of a tax, etc., any citizen having a common interest in the collection of the tax may have mandamus to compel him to do so. *People ex rel. Stephens v. Halsey*, 37 N. Y. 346. The court says that, in this case, inasmuch as the people themselves are the plaintiffs in the proceeding by mandamus, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of mandamus must show an individual right to the thing asked, must be taken to apply to cases where an individual interest is alone involved, and not to cases where the interest is common to the whole community.

In the *Matter of Whitney*, 3 Supp. 838, it was held that mandamus may be had by any citizen or class of citizens, to enforce that part of the law requiring policemen and officers of the police to enforce the law requiring persons licensed to sell intoxicating liquors, to keep their places closed during hours forbidden by

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statute. A citizen is a proper relator to compel a board of supervisors of counties to meet, as required by statute, and divide their respective counties into so many assembly districts as they were entitled to. *People ex rel. Pond v. Supervisors of Monroe County*, 47 St. Rep. 457, reversed on other grounds, 47 St. Rep. 702. No personal interest in a relator is essential in order to enable him to have mandamus compelling a board of supervisors to vacate their order directing the payment of a claim not authorized by law. *People ex rel. Lawrence v. Supervisors of Westchester*, 11 Hun, 308.

Any citizen of a county has a sufficient interest in the publication of the laws to enable him to be a relator in a mandamus to compel a board of supervisors to designate two newspapers for such publication as required by statute. *People ex rel. Waller v. Supervisors*, 56 N. Y. 252. Any citizen of the State may apply as relator for a writ of mandamus to compel a railroad company to construct fences and cattle-guards, as required by statute, when it has failed to do so. *People ex rel. Garbutt v. R. & S. L. R. Co.*, 14 Hun, 374. A private citizen may be relator in proceedings by mandamus to compel a board of supervisors to convene and divide the county into assembly districts, when, by their failure to do so, the district where the relator resided was deprived of just representation. *Peo. ex rel. Baird v. Supervisors of Kings Co., etc.*, 138 N. Y. 115. A citizen of a county who is put to inconvenience by reason of the non-repair of a bridge may be relator in proceedings by mandamus to compel the board of supervisors to repair the bridge, when they are required to keep the same in repair. *People ex rel. Keene v. Supervisors*, 142 N. Y. 277.

Query as to whether a statutory provision directing a municipal corporation to employ a designated class of labor in order that the service may be well performed, gives the persons answering the designation a right to act as relators and compel the municipal body by mandamus to employ them. *People ex rel. Francis v. Common Council*, 78 N. Y. 38.

The writ of mandamus is a State writ and should be issued in the name of the people of the State, but where it is awarded upon the application of a private person, it must show that it was issued on the relation of that person. Code of Civ. Proc. § 1991; *People ex rel. Mason v. Board of Supervisors of Wayne*,

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45 Hun, 63. And being a State writ and issuing in the name of the people, it should not be entitled in an action but as a distinct and separate proceeding. *Youmans v. Terry*, 32 Hun, 625. An application for mandamus to compel a street-car company to run its cars may be made by any citizen of a city in which the road is located. *Loader v. Brooklyn Heights R. R. Co.*, 14 Misc. 208, 35 Supp. 996. The crier of a court, being in possession of his office, cannot be ousted by mandamus against the judge appointing him without being made a party to the proceeding. *Peo. v. Wendell*, 57 Hun, 362, 10 Supp. 587.

Not only a municipal board, such as the board of police, may be made respondents in proceedings by mandamus, but also each individual member of such board may be made respondents as well as the board itself, and in such case each member should make a return thereto. *Peo. ex rel. McMackin v. Board of Police*, 46 Hun, 301, affirmed, 107 N. Y. 235.

Where proceedings by mandamus are commenced against a mayor in his official capacity and not against him individually, the proceeding continues against his successor in office. In determining whether the writ was to operate upon the office through the incumbent, or only upon the incumbent, the test seems to be whether the duty enjoined would be obligatory on the successor in office. In such a case, the writ may issue against the office by name, without the name of the incumbent appearing therein. *Peo. ex rel. Wooster v. Maher*, 64 Hun, 413, reversed on other grounds, 141 N. Y. 330.

It has been held that the mayor of a city is not a proper party respondent in proceedings by mandamus against the auditor and the comptroller of said city requiring the latter to audit and certify a claim, even though the mayor would be required to sign the warrants upon the treasury after such audit. The ground is that the determination of the amounts due upon said claims by the auditor and comptroller precedes any duties imposed upon the mayor. *Peo. ex rel. Kings County Gas Co. v. Schieren*, 89 Hun, 220. Where the failure to perform the act sought to be coerced was on the part of an officer whose term has expired, mandamus may still issue to his successor in office. *Peo. ex rel. Dannatt v. Comptroller*, 77 N. Y. 50. See as to the abatement of mandamus proceedings upon death of party, *Peo. ex rel. McAllister v. Lynch*, 68 N. Y. 473; on change in

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State officer. *Peo. ex rel. Broderick v. Norton*, 156 N. Y. 136. Mandamus on behalf of the people in their sovereign capacity can be awarded only upon the application of the attorney-general or some district attorney, and the indorsement upon the writ must show that it was issued upon such application. *Peo. ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 373. When the proceeding is one to enforce a civil remedy only and the people are present merely as the formal party, their presence is due to the survival of a form which has long since ceased to have any significance or utility. The real party in interest is the relator in such a case, and if he should die, the proceeding will abate. *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 373, High's Extraordinary Legal Remedies, § 430 *et seq.*

Any elector may be relator to compel the State board of canvassers to disregard a paper purporting to be a return of a board of canvassers, and which does not give the results of a proper legal canvass, and to consider only a proper return, at least in a case where the interested candidate is dead. *People ex rel. Daley v. Rice*, 129 N. Y. 453.

By chapter 25 of the General Laws, § 31, the State Board of Health or its president or secretary, or a local board of health or its president or secretary, or any citizen of full age resident of the municipality, may compel by mandamus the performance of any act or duty required by the Public Health Law. Where the matter does not concern the general public but is to promote certain private rights, the personal interest of the relator in the matter in controversy must be clearly shown to entitle him to maintain the proceeding. Thus, the rector of a church is held to have no such interest in its consolidation with another corporation as to enable him to prosecute as relator, when he has never been authorized by a board of vestrymen so to do. *St. Stephen's Church Cases*, 25 Abb. N. C. 247. But the rector of a church is a proper relator in mandamus to compel the vestrymen to attend a duly called meeting from which they intentionally absent themselves and which cannot be held in their absence. *People ex rel. Kenny v. Winans*, 29 St. Rep. 651, 9 Supp., 249. It seems it is not a valid objection that the supervisors of several towns join as relators in a writ of mandamus. *People ex rel. v. Board of Supervisors of Ontario*, 85 N. Y. 326; see, also, S. C. 17 Hun, 505.

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The attorney-general may apply for mandamus only to protect some public right or to secure some public interest, and where private interests only are involved the application by the attorney-general is not proper; in such a case the writ must be applied for by the private parties interested, who must be relators, and where the writ is applied for by the attorney-general, the court granting it must be able to see from the undisputed facts alleged that it is asked to protect some public right. *People v. R. W. & O. R. R. Co.* 103 N. Y. 105. The death of one co-partner among relators does not abate the alternative writ after issue joined thereon. *People ex rel. Witherbee v. Suprs.*, 70 N. Y. 228. A writ of mandamus may properly be directed to the cashier of a bank to compel him to permit a director to inspect the discount book, and it need not be directed to the board of directors; the rule being that the writ should issue to him who has to do the thing required to be done, but it seems that there would be no impropriety in issuing the writ to the board of directors as well. *Peo. v. Throop*, 12 Wend. 187.

SUB. 2. THE PETITION OR AFFIDAVIT.

The affidavit upon which the writ is granted must not be entitled in a cause. *Haight v. Turner*, 2 Johns. 371; *People v. Common Pleas*, 1 Wend. 291; *People v. Sage*, 2 How. 59; *People v. Dikeman*, 7 id. 124. See *Ex parte La Farge*, 6 Cow. 61. The cause may take its title on granting of the order for the writ. *People v. Sage*, 2 How. 60. The affidavits must show the facts. 1 Johns. Cas. 134; 3 T. R. 575. The facts should be set forth with precision. 5 T. R. 466; 2 Johns. Cas. 211.

By § 2076 of the Code of Civil Procedure, it is provided that the alternative writ of mandamus as to the joinder therein of two or more grievances, the command of the writ, etc., are subject to the provisions of the Code respecting the statement in a complaint of the facts constituting a cause of action, etc., and likewise the affidavits upon which an application for the writ is founded must comply in form to the rules of pleading; and it has in fact been held, in *People ex rel. Del Mar v. St. L. & S. F. R. Co.*, 47 Hun, 544, 14 St. Rep. 885, that these preliminary affidavits are in the nature of a complaint.

A relator, to entitle himself to the writ, must show that he is legally and equitably entitled to some right properly the subject

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of the writ, and that it is legally demandable from the person to whom the writ is to be directed, and also that such person still has it in his power to perform the duty required; and, moreover, he must show affirmatively that whatever is required to be done by him as a condition precedent to the right demanded has been performed by him. *The People ex rel. Stevens v. Hayt*, 66 N. Y. 607, reversing 7 Hun, 39. He must show facts which give him a strict legal right to the writ; thus, if the facts shown should leave him a remedy at law, the writ will be denied. *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; see, also, *People ex rel. McMakin v. Board of Police*, 107 Y. 239, 11 St. Rep. 412. He is bound to show, as the foundation for the proceeding, that the specific act sought to be coerced is the duty of the person against whom the writ is directed, and that such person has no discretion as to its exercise. *People ex rel. Allen v. Murray*, 2 Misc. 155, 23 Civ. Pro. 71, affirmed without opinion, 138 N. Y. 635.

Where tender must be shown on the part of a relator, it must be shown to be a full tender of present performance; if the tender was conditional, the writ will be denied. *Matter of McGrath*, 56 Hun. 78, 29 St. Rep. 704. The relator must show some present disregard of duty on the part of the respondent; mandamus will not be granted where it is shown that the respondent "is about" to disregard his duty. *People ex rel. Sayles v. Fitzgerald*, 37 St. Rep. 540, 13 Supp. 663, affirmed, 128 N. Y. 620. The affidavit must not contain scandalous matter, or it may be stricken out by the court on its own motion, *People ex rel. Allen v. Murray*, 22 Supp. 1051, 23 Civ. Pro. 53.

It has been held that the relator must not ask for more than he is entitled to, or the writ will be denied. *People ex rel. Ketteltas v. Cady*, 2 Hun, 225; *People ex rel. Byrnes v. Greene*, 64 Barb. 162. But see *People ex rel. Keene v. Supervisors*, 142 N. Y. 277, reversing 71 Hun, 97, where it was held that the court may issue a peremptory writ on the final determination of the alternative writ, even though the relator asks too much, or mistakes to some extent the relief to which he is entitled; in awarding the peremptory writ the court may mould it according to the just rights of all the parties.

The affidavits upon which an application for a peremptory writ is made must all be served upon the respondent, or they cannot

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be considered upon the motion if objection is made thereto. *People ex rel. Del Mar v. St. L. & S. F. R. Co.* 47 Hun, 544, 14 St. Rep. 885. It may be noted here that the facts which it is necessary to state in the petition for an alternative writ should also be set forth in the writ itself, for the court cannot look to the petition for the facts which should have been stated in the writ itself. *People ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 323, 15 Supp. 821. But where the allegations of the petition upon which the alternative writ was granted are incorporated into and made a part of the writ, the court held, upon appeal, that they were to be regarded as part of the writ itself in a case where the respondents have not been misled, or harmed, and took issue upon those allegations. *Peo. ex rel. Witherbee v. Supers*, 79 N. Y. 236.

A petition for mandamus to a city council to appoint to office an honorably discharged soldier of the civil war under the civil service law, has been held to be fatally defective in not averring that the council knew that he was an honorably discharged soldier. *In re Wortman*, 2 Supp. 326, 22 Abb. N. C. 143. It seems that on an application for mandamus, if the facts are alleged to be upon information and belief, the sources of information and belief must be set forth or the affidavit will be held not to prove the facts alleged. *People ex rel. O'Brien v. Cruger*, 12 App. Div. 537.

Where the order to show cause upon which the peremptory writ is issued contains the usual request "or for other relief," the Supreme Court has power to grant the writ for any relief to which the relator is entitled, although it is not specified in the order to show cause. *Peo. ex rel. Henry v. Nostrand*, 46 N. Y. 377. The facts required to be set forth in an application for mandamus are similar to those required to be set forth in the alternative writ itself. This will be fully treated under § 2076. It should appear from the petition, that a demand has been made on the defendant to do the thing which he is sought to be compelled to do, and that he has refused or neglected to do it. *Moses on Mandamus*, 204; *In re Whitney*, 3 Supp. 839, 24 St. Rep. 968.

The affidavit of the respondent, in answer to the affidavit of the relator moving for a peremptory writ, must state facts and not conclusions of law, otherwise no issue of facts is raised. *Matter*

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of *Pierce Butler & Pierce Mfg. Co.*, 62 Hun, 266, 42 St. Rep. 568, 16 Supp. 786, affirmed, without opinion, 131 N. Y. 570. When, upon a motion for a peremptory writ in the first instance, every material statement of fact in the respondent's affidavit is upon information and belief, the affidavit will be disregarded. *Matter of Sheehan v. Treasr. Long Island City*, 11 Misc. 488, 67 St. Rep. 277, 33 Supp. 428. The alternative writ may be granted without notice. *Peo. ex rel. Fisk v. Deverman*, 83 Hun, 183, 64 St. Rep. 147, 31 Supp. 593. A change in the personnel of a town board, since its refusal to act, is no reason for denying a mandamus where the purpose of the writ is to require the board as such to act, *Peo. ex rel. Slater v. Smith*, 83 Hun, 437, 64 St. Rep. 419, 31 Supp. 749.

Unspecific and indefinite statements and denials or statements and denials upon information and belief are worthless upon an application for mandamus. *Matter of Guess*, 16 Misc. 307, 74 St. Rep. 387, 38 Supp. 91; *Matter of Frecl*, 73 St. Rep. 331, 38 Supp. 143.

Where one sought to enforce a preference for an office under the Veteran Law (Laws 1894, chap. 916), and it does not appear from his affidavit that he was a discharged soldier and as such entitled to preference, and the opposing affidavit stated that his application for the office contained no such averment, it was held that the relator did not make out a case either for a peremptory or for an alternative writ. *Peo. ex rel. v. Trustees Cohocton*, 17 Misc. 654.

Precedent for Affidavit.

ULSTER COUNTY, ss.:

Louis Bevier, of the town of Marbletown, in the county of Ulster, being duly sworn, says that he is the supervisor of said town, and acting as such.

That at the annual session of the board of supervisors of Ulster County in 1886, which has not yet closed, the said board so equalized the value of the real estate in said county, and especially of the town of Marbletown, as to do great injustice to said town; that an appeal has been taken by said town from such equalization to the State assessors; that on the 29th day of November, 1886, a resolution was adopted by said board, a copy of which is hereto annexed, in and by which the sum of \$10,000 was directed, levied, and raised on the entire county of Ulster for the payment of the expenses of the said appeal, in opposition, and contrary to and against the interests of the said town, and not for the benefit or in the interest of the entire county, but for the sole use

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and benefit of the towns in said county which may be benefited by the said equalization as appears in and by said resolution. Wherefore deponent prays that a mandamus issue out of this court directing and commanding the said board of supervisors of Ulster County to strike said sum of \$10,000 from the assessment-roll, so far as it relates to and affects the town of Marbletown, and that they shall not levy any part of the same on the said town of Marbletown, and to modify said resolution so as that no part of said sum shall be so levied, or for such other or further order as to the court shall seem just.

LOUIS BEVIER.

Subscribed and sworn to before }
me, December 2, 1886. }

HENRY E. McKENZIE,

Notary Public.

Another Precedent.

ULSTER COUNTY, ss. :

Michael Dunn, being duly sworn, says he is the supervisor of the town of Kingston, That upon application of the attorney for persons holding claims against the old town of Kingston, before its division on indebtedness which accrued before the division of that town, this deponent called a meeting, pursuant to statute, of the officers authorized to apportion the debts of said old town between the towns of Kingston, Ulster, and Woodstock, for the purpose of making such apportionment. That a copy of said call, with proof of service thereof on the supervisors and overseers of the poor of the towns of Ulster and Woodstock, is hereto annexed. That said notice was served on Michael Britt, overseer of the poor of the town of Kingston, by deponent on the 25th day of November, 1885. That at the time and place mentioned in said notice, to wit, at the house of Bernard Johnson in the town of Ulster, on the 30th day of November, 1885, at ten o'clock in the forenoon, this deponent, supervisor of said town of Kingston, and Michael Britt, overseer of the poor of said town of Kingston, appeared and attended for the purpose of taking proper action pursuant to said call. That the supervisor of the town of Ulster, Lorenzo Dunnegan, and Martin E. Hendricks, the overseer of the poor of the said town, and Albert Vosburgh, supervisor of the town of Woodstock, and Andrew Eltinge, overseer of the poor of said town of Woodstock, failed and neglected to appear at the said place of meeting, although deponent and said Michael Britt waited at said place for more than an hour after the time named in said notice or call.

Deponent is informed by Bernard Johnson, at whose house said meeting was called, that said supervisors and overseers of the poor of said towns of Ulster and Woodstock did not attend at all during that day, nor at any time pursuant to said call or notice.

That deponent is informed by said Lorenzo Dunnegan that they do not intend to appear or act in the matter. That said town of Kingston was divided in the year 1879, a part thereof remaining as the town of

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Kingston, and a part of the balance thereof erected into the town of Ulster, and a part annexed to the town of Woodstock.

That the abstract hereto annexed is an abstract of the claims audited against the said old town of Kingston before its division and remaining unpaid, and shows debts owing by said old town, as deponent believes, to the amount of \$20,000 and upwards.

(*Jurat.*)

MICHAEL DUNN.

SUB. 3. THE WRIT AND PRACTICE ON MOVING THEREFOR.

Denials and affirmative allegations made expressly and solely upon information and belief, where there is no disclosure by affiant of the sources of his information, or the grounds of his belief, do not put in issue positive allegations in the affidavit of the moving party upon an application for a peremptory mandamus, excepting cases where a public officer or other party proceeded against cannot positively have any knowledge of the subject-matter as based upon the communication from others. *Pco. ex rel. Rau v. York*, 31 App. Div. 527, 52 Supp. 401, 86 St. Rep. 401. On the return of the order to show cause, allegations of the petition and moving papers which are not denied must be taken as true. *Pco. ex rel. Bowers v. Dalton*, 23 Misc. 294, 50 Supp. 1028, 84 St. R. 1028.

A demand for a peremptory mandamus admits the truth of answering affidavits. *Pco. ex rel. Peck v. Town Bd. of Salina*, 27 App. Div. 476, 50 Supp. 533, 84 St. Rep. 533. The object of the peremptory writ of mandamus is not to determine controversies but simply to enforce a clear specific legal right, when such right depends only upon questions of law. *Pco. ex rel. Hoyt v. Board of Trustees*, 19 Misc. 673.

The peremptory writ can only be issued upon motion when the applicant's right depends upon questions of law, therefore, in considering whether the applicant is entitled to the peremptory writ, any averments in his papers which are denied in the opposing affidavits, must be disregarded, and the facts of the affidavits assumed to be true. *Pco. ex rel. O'Brien v. Cruger*, 12 App. Div. 537. After the proof is all in and it appears that no material fact is in dispute, and the right of the applicant to the writ depends upon the decision of questions of law, the peremptory writ may issue and there is no need of the alternative writ. *People ex rel. Bantel v. Morgan*, 20 App. Div. 50.

Upon motion for a peremptory writ it can only be granted

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when the right depends solely on questions of law, and if any disputed question of law is presented, the court must deny the motion. *People ex rel. Canavan v. Collins*, 20 App. Div. 342.

Precedent for Order to Show Cause why Peremptory Writ should not Issue.

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, December 1, 1884:

Present:—Hon. Charles R. Ingalls, *Justice*.

The People of the State of New York	} 36 Hun, 491.
<i>agst.</i>	
The Board of Supervisors of the County of Ulster.	

Upon the annexed petition of I. H. Maynard, deputy attorney-general of the State of New York, let the above-named, the board of supervisors of the county of Ulster, or its attorneys, show cause at a Special Term of the Supreme Court to be held in and for the county of Ulster, at the court-house in Kingston, N. Y., on the 3d day of December, 1884, at one o'clock in the afternoon of said day, why a peremptory writ of mandamus should not issue out of and under the seal of this court, directed to the above-named board of supervisors of the county of Ulster, requiring the said board of supervisors thereafter to forthwith raise by taxation upon the taxable property situated in the said county of Ulster, State of New York, in the same manner as other State taxes are raised, an amount sufficient to pay the indebtedness of said county mentioned in the said affidavits annexed, to the State of New York, and why such other and further relief should not be accorded in the premises as may be just, and let service of this order of less than eight days, to wit, on or before the 2d day of December, 1884, be deemed sufficient, cause therefor appearing in said petition annexed.

Dated Albany, December 1, 1884.

C. R. INGALLS,
Justice Supreme Court.

Alternative Writ in First Instance.

To the People of the State of New York, on the relation of PATRICK CASEY, WILLIAM RYAN, *and* JAMES PARSLow, *to* LORENZO DUNNEGAN, *Supervisor, and* MARTIN E. HENDRICKS, *Overseer of the Poor of the Town of Ulster, ALBERT VOSBURGH, Supervisor, and* ANDREW ELTING, *Overseer of the Poor of the Town of Woodstock, and* MICHAEL DUNN, *Supervisor, and* MICHAEL BRITT, *Overseer of the Poor of the Town of Kingston :*

WHEREAS, It appears on the relation of Patrick Casey, William Ryan,

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and James Parslow, that they are the owners and holders of certain claims against the old town of Kingston, as it existed previous to the division of the town in 1879, which said claims were audited by the board of town auditors of said town, and are valid and subsisting claims against said town, and that the towns of Ulster and Kingston have been formed from said town of Kingston, and a portion thereof annexed to the town of Woodstock, and that the supervisors of said towns and overseers of the poor thereof have never met or apportioned the debts owing by said town of Kingston as it existed before the division. That a call was made by the supervisor of the town of Kingston for a meeting for that purpose, and that the supervisors and overseers of the poor of the towns of Ulster and Woodstock failed to appear at the time and place mentioned, due notice thereof having been given them :

Now, therefore, we command you that you and each of you meet at the house of Bernard Johnson, in the town of Ulster, on the 10th day of December, 1885, at ten o'clock in the forenoon of that day, and then and there proceed to apportion the debts, owing by the town of Kingston, as it existed before the division thereof, between the towns of Ulster, Kingston, and so much of Woodstock as is liable therefor by reason of having been set off from said old town of Kingston and annexed to said town of Woodstock, and that you complete such apportionment and make and file a certificate thereof, and furnish a copy of the same to relator's attorneys on their request before the 12th day of December, 1885, and in what manner this, our command, is executed, make appear to our Supreme Court at the City Hall in the city of Kingston, on the 12th day of December, 1882, then and there returning this our writ, according to the provisions of title 2 of chapter 16, Code of Civil Procedure.

Witness, Hon. A. M. Osborn, justice of the Supreme Court at his
[L. s.] chambers in the village of Catskill, on the 7th day of December, 1885.

JACOB D. WURTS,

Clerk.

F. L. & T. B. WESTBROOK,

Attorneys for Relators.

Indorsed :—" Allowed this 7th day of December, 1885.

" A. M. OSBORN,

" Justice Supreme Court."

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Order for Peremptory Writ. .

At a Special Term of the Supreme Court of the State of New York, held at the chambers of Mr. Justice Peckham, in the city of Albany, on the 8th day of January, A. D. 1885 :

Present :—The Honorable Rufus W. Peckham, *Justice*.

The People of the State of New York, <i>agst.</i> The Board of Supervisors of the County of Ulster.	}	36 Hun, 491.
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The order to show cause herein granted at Albany Special Term, on the 1st day of December, 1884, and made returnable on the 2d day of December, 1884, at Kingston Special Term, having been continued from said return day until the present term of this court, and coming on to be heard ; after reading and filing the petition of Isaac H. Maynard, deputy attorney-general, verified December 1, 1884, and said order to show cause, and the affidavit of F. B. Delehanty, sworn to December 1, 1884, and after hearing the Hon. Isaac H. Maynard, of counsel for the plaintiffs, for, and J. N. Fiero, Esq., of counsel for said defendant, in opposition thereto, it is

Ordered, that the prayer of said petition be and the same is hereby granted, and that a peremptory writ of mandamus issue out of and under the seal of this court, directed to the above-named board of supervisors of Ulster County, and requiring said board thereafter to forthwith raise by taxation upon the taxable property situated in said county of Ulster, in the same manner as other State taxes are raised, the sum of twenty-eight thousand and ninety-eight dollars and twenty-two cents (\$28,098.22), with interest thereon from December 1, 1884, said sum being the amount of the indebtedness of said county to the State of New York, and pay the same into the treasury of the State.

Said plaintiffs are hereby allowed the sum of fifty dollars (\$50) as their costs of this proceeding.

Enter in Albany County.

R. W. PECKHAM,
Justice Supreme Court.

The recitals and statements in writ must be sufficient to show what is required without reference to the affidavits. *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25. But it should contain nothing but pertinent allegations. *People v. Ovenshire*, 41 How. 164. The alternative writ is in the nature of a pleading. *People v. Ransom*, 2 N. Y. 490.

The court will only grant the writ of mandamus on the attorney-general's application, when it is able to see, from the undisputed facts alleged, that its issuance is necessary to protect

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some public right or secure some public interest. Where private interests only are involved, the interested parties should be the relators. *People v. Rome, etc., R. R. Co.*, 3 State Rep. 39, 103 N. Y. 95. And it is only where private redress is had that the relator must show an interest, as a citizen and taxpayer may compel the common council to follow a statute. *People v. Common Council of Buffalo*, 16 Abb. N. C. 96. Where a mandamus is asked to compel repayment of taxes illegally collected, it is incumbent on the relator to show taxes invalid. *People v. Brinkerhoff*, 20 Week. Dig. 391. And whatever is required to be done by relator as a condition precedent to the right demanded must be shown affirmatively to have been done. *People v. Hayt*, 66 N. Y. 606. The writ must be addressed to the person, body, or board who is obliged by law to execute it, or whose duty it is to do the thing required. *People v. Common Council*, 3 Keyes, 81; *People v. Police Comm'rs*, 8 Abb. 41; *People v. Throop*, 12 Wend. 183. If it is desired to convene a board of supervisors, the writ so ordering may be directed to the chairman and clerk. *People v. Brinkerhoff*, 68 N. Y. 259. Mandamus to compel payment by the board of education of the city of New York must be directed (before chap. 210, Laws of 1882) to the president and clerk. *People v. Neilson*, 5 T. & C. 367. Where a board is not incorporated the writ should be directed to the individuals composing it. *People v. Civil Service Board*, 17 Abb. N. C. 64, affirmed, 41 Hun, 287.

A seal is necessary to a writ of mandamus, and where a writ was served which had no seal, it was not sufficient to found proceedings for contempt when it was not obeyed. *People ex rel. Clapp v. Fisk*, 1 Hun, 464; S. C. 3 T. & C. 461. It should be tested, signed, and sealed. 1 Burr. Pr. 95, 97, 2 id. 177. The writ must set forth with certainty the duty to be performed. *People ex rel. Clark v. Commissioners of Reading*, 1 T. & C. 193; *Fish v. Weatherwax*, 2 Johns. Cas. 215. But it must not ask too much or it will be denied, particularly if an alternative writ has been issued setting out the act required. *People v. Supervisors*, 1 Hill, 50; *People v. Supervisors*, 12 Barb. 446; *People v. Brennan*, 39 id. 523; *People v. Baker*, 35 id. 105; *People ex rel. Byrnes v. Green*, 64 id. 162; *People ex rel. v. Cady*, 2 Hun, 224. The writ may be amended as to irregularities at any time before it is returnable. *People v. Baker*, 35 Barb. 104; *People v. Metropolitan*

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Police Commissioners, 5 Abb. 241. It was held in the case first cited that the writ could not be amended after return, but the case last above cited probably gives the rule as it is now held, that the provisions with regard to amendments to pleadings must be held to extend to the writ; more particularly is this the case since the alternative writ is held to be a pleading. On the same point is *People v. Commissioners of Highways of Fort Edward*, 11 How. 89.

It was held that a peremptory writ issued in the first instance could be served on inspectors of election on election day, notwithstanding I. R. S., 6th ed., 427, which prohibits the service of civil process on an elector on election day. *Pco. ex rel. Lower v. Donovan*, 63 Hun, 512, 45 St. Rep. 142, 18 Supp. 501, reversed on a question of jurisdiction, 135 N. Y. 81, 23 Civ. Pro. 9.

Precedent for Peremptory Work.

The People of the State of New York to the Board of Supervisors of Ulster County:

WHEREAS, It appears to us from the petition of Isaac H. Maynard, deputy attorney-general, verified December 1, 1884, that the said county of Ulster is indebted to the State of New York for unpaid certificates assigned by the comptroller to said county in pursuance of the provisions of the several acts of the legislature in said petition referred to, in the sum of twenty-eight thousand ninety-eight and 22-100 dollars (\$28,098.22), with interest from December 1, 1884, and that, nevertheless, you have unjustly refused to raise by taxation, or cause to be raised, as required by law, the amount due the State by reason of the facts in said petition stated, as appears therefrom, and which petition we have adjudged to be true as appears to us of record:

Now, therefore, we command you forthwith to raise, or cause to be raised, by taxation upon the taxable property situated in said county of Ulster, in the same manner as other State taxes are raised, the said sum of twenty-eight thousand and ninety-eight and 22-100 dollars (\$28,098.22), with interest thereon from December 1, 1884, and pay the same into the treasury of the State of New York.

And in what manner this, our command, is executed, make appear to our said Supreme Court at its Special Term, to be held in the city of Albany on the 9th day of February next, then and there returning this our writ according to the provisions of title 2, chapter 16, of the Code of Civil Procedure.

Witness, the Hon. Rufus W. Peckham, justice of our said court, [L. S.] at the City Hall in Albany, this 9th day of January, A. D.

1885.

D. O'BRIEN,

Attorney-General.

WM. D. STREVELL,

Clerk.

 Art. 4. Peremptory Writ and Return Thereto.

SUB. 4. THE RETURN. §§ 2072, 2075, 2073, 2074.

§ 2072. [Am'd, 1895.] Writ; how returnable.

An alternative writ must be made returnable twenty days after the service thereof, at the office of the clerk of the county designated therein, in which an issue of fact joined thereupon is triable. A peremptory writ must be made returnable at a Special Term or a term of the appellate division of the Supreme Court, designated therein, to which application for the alternative writ might have been made.

§ 2075. Motion to set aside writ.

An alternative writ of mandamus cannot be quashed or set aside upon motion for any matter involving the merits. A motion to set aside such a writ, for any other cause, or to set aside or quash a peremptory writ of mandamus, or to set aside the service of either writ, must be made at a term whereat the writ might have been granted.

§ 2073. Return or demurrer to first writ.

Where the first writ of mandamus has been duly served, a return must be made to the same, as therein required, unless it is an alternative writ, and a demurrer thereto is taken. In default of a return, the person or persons upon whom the writ was served may be punished, upon the application of the people, or of the relator, for a contempt of court.

§ 2074. [Am'd, 1895.] Return, how made.

The return to an alternative writ of mandamus must be annexed to a copy of the writ; and must be filed, in the office of the clerk where it is returnable, within the time specified in the writ. The return to a peremptory writ of mandamus must be likewise annexed to a copy thereof; and must, before the expiration of the first day of the term at which it is returnable, be either delivered in open court or filed in the office of the clerk of the county wherein the term is to be held.

A motion to quash or set aside the writ is founded upon some irregularity or defect in the writ or procedure anterior thereto. *People v. Collins*, 19 Wend. 67; *Commercial Bank of Albany v. Canal Commissioners*, 10 id. 25; *People v. Tracy*, 1 How. 186. The motion may be made after service of alternative writ and before the return. *People v. Board of Supervisors*, 14 Barb. 52. The motion gives the defendant the benefit of a demurrer without resorting to that plea, since it is in the nature of a demurrer, and admits the truth of the matters alleged. *People v. College of Physicians and Surgeons*, 7 How. 290; *People ex rel. v. Supervisors*, 32 Barb. 473. Immaterial or argumentative matters or surplusage may be stricken out of a return. *People v. Commissioners of Highways of Fort Edward*, 11 How. 89; *People v. Van Leuven*, 8 id. 358; *People v. Ransom*, 2 N. Y. 496. An evasive return might, under the former practice, be quashed on motion. *People v. White*, 11 Abb. 168; *People v. Board of Police*, 8 id. 257. The practice as to motion to quash or set aside the writ is considered in *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 543.

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In that case the relators obtained an order to show cause why a peremptory writ of mandamus should not issue; on the return day defendants appeared by counsel and moved to quash on the grounds that the moving papers did not show facts sufficient to entitle the relator to the relief asked; thereupon the defendant was allowed to be heard, and under objection to open and close the argument, and the motion was granted to quash. It was held to be irregular to hear such a motion before the issuing of the writ, and also to allow the defendant to open and close the argument, and that the proper practice is to move to quash or set aside after granting of an alternative writ, and before return, treating the motion substantially as a demurrer. The objection that the supervisors of several towns joined as petitioners for a mandamus to compel the board of supervisors to obey an order of the State assessors must be taken by motion to quash; it does not go to the merits; and when the board has answered and a demurrer to the answer been interposed, the matter must be heard on the merits. *People ex rel. v. Board of Supervisors*, 85 N. Y. 323. It is further held in the same case that the ground above stated is not sufficient ground to quash, and the same principle is held in *People ex rel. Bray v. Supervisors of Ulster County*, 17 Week. Dig. 138, where the mayor of a city and supervisor of a town united as petitioners.

It has been held to be no excuse for not making the return that the writ has not been returned and filed. *People v. Westchester Common Pleas*, 4 Cow. 73; *Root v. King*, id. 403. See *Snowden v. Roberts*, id. 69. The time to make the return may be extended by order, as in case of a pleading. *People v. Judges of Ulster County*, 1 Johns. 64; *People v. Westchester Common Pleas*, 4 Cow. 73; *Root v. King*, id. 403.

Where several parties are made respondents to the same proceeding in mandamus, each of such parties is not only at liberty but it is his duty to make a return. *Peo. ex rel. McMackin v. Board of Police*, 46 Hun, 302. See here the discussion on this point. Under the circumstances of this case, it was held that the admissions of two of the commissioners, even as representatives of the board itself, were not conclusive against the other members. *Peo. ex rel. McMackin v. Board of Police*, 46 Hun, 302. It was held in regard to a peremptory writ, that when the order to show cause whereon it was granted contained the usual

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request "or for other relief," the court may grant in the peremptory writ any relief to which the relator is entitled, although not specified in the order to show cause, and it was also held that the mandatory part of such peremptory writ need only describe the thing to be done with reasonable certainty. *Pro. ex rel. Henry v. Nostrand*, 46 N. Y. 377-380. Scandalous matter, in an affidavit on which an application for a writ of mandamus is founded, has been stricken out by the court on its own motion (*Pro. ex rel. Allen v. Murray*, 22 Supp. 1051), and scandalous matter in the writ itself will probably be stricken out on the same principles.

If, upon a hearing of an application for mandamus, the respondent proceeds without traversing the averments in the affidavits presented by the relator, it is equivalent to a demurrer on the part of the respondent, and he can succeed only by showing, upon the facts stated, that the relator was not in law entitled to the relief demanded. *Pro. ex rel. Superintendents of Poor of Oswegatchie v. Bd. Sup. St. Lawrence Co.*, 103 N. Y. 543.

The person, body, board, tribunal, or corporation to whom the writ is directed, and upon whom it is served, must make a return, unless the writ is quashed or the defendant performs the act directed, and thus disposes of the controversy. *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25. In case of an alternative writ of course it would be necessary for the defendant to appear and show that the act had been performed. The question of costs, too, would come up at that time. In case of failure to make return, proceedings may be taken as for contempt, and founded upon the usual papers for that purpose.

Precedent for Notice of Motion to Quash.

SUPREME COURT.

People <i>ex rel.</i> Charles Bray <i>et al.</i>
<i>agst.</i>
Board of Supervisors of Ulster County.

Please take notice that this court will be moved at a Special Term thereof, to be held at the City Hall in the city of Albany, on the 30th day of December, 1886, at the opening of the court on that day, for an order quashing and setting aside the alternative writ of mandamus

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herein granted December 20, 1886, or for such other or further relief as to the court may seem just. Yours, etc.,

H. CHIPP, JR.,
Attorney for Defendant.

To J. J. LINSON, Esq.,
Corporation Counsel, Attorney for Relators.

Return of Compliance with Writ.

(Title.)

The return of the defendants to the peremptory writ of mandamus granted herein on the 7th day of December, 1885, shows to the court that, on the 10th day of December, 1885, we met at the time and place commanded in the writ, and proceeded to act in accordance with the directions therein contained, and we certify and return that we apportioned the debts owing by the old town of Kingston at the time of its division, in 1879, as follows, upon the towns of Ulster, Kingston, and so much of Woodstock as was annexed thereto from said town of Kingston, as follows, viz.: That the town of Ulster be charged with .9096 of the whole indebtedness of said town of Kingston as it existed at the time of such division; that the town of Kingston be charged with .053 per cent. of said indebtedness, and that the portion of the town of Woodstock annexed to said town from the old town of Kingston be charged with .0374 per cent. thereof.

We further certify and return that from the abstracts presented to us we find the indebtedness of said old town of Kingston, at the time of the division, to have been the sum of \$22,573.38.

In witness whereof the members of said board of apportionment have hereunto affixed their signatures, this 10th day of December, 1885.

(Signed by members individually.)

M. SCHOONMAKER,
Attorney for Defendants.

Form of Judgment.

(Title.)

A peremptory writ of mandamus having issued out of this court after due notice to the defendants herein, on order of Special Term, granted December 5, 1885, in and by which these defendants were directed to meet at the house of Bernard Johnson, in the town of Ulster, on the 10th day of December, 1885, then and there to apportion the debts owing by the old town of Kingston, between the towns of Ulster, Kingston, and a portion of Woodstock, and granting fifty dollars costs and their disbursements to relators, and the defendants having made and filed the certificate required by such order and writ and return thereto: Now, on motion of F. L. & T. B. Westbrook, attorneys for relators, it is adjudged that the town of Ulster be charged with .9096 per cent. of the whole indebtedness of the said town of Kingston as it existed before the division; that the town of Kingston be charged with .0530 per cent. of the whole indebtedness of said town of Kingston as it existed before the division. That the portion of the town of Woodstock annexed to

 Art. 5. Alternative Writ and Proceedings Thereon.

said town from the old town of Kingston be charged with .0374 per cent. of the whole indebtedness of said town of Kingston as it existed before the division.

It is further adjudged that the plaintiff's relators recover of the defendants, Lorenzo Dunnegan, Martin E. Hendricks, Albert H. Vosburgh, and Andrew Elting, the sum of seventy-two dollars and sixty-nine cents, cost and disbursements, and have execution therefor.

M. S. DECKER,
Deputy Clerk.

ARTICLE V.

ALTERNATIVE WRIT AND PROCEEDINGS THEREON. §§ 2067,
2071, 2072, 2074, 2075, 2076, 2077, 2078 to 2085.

SUB. 1. APPLICATION FOR ALTERNATIVE WRIT. § 2067.

2. DEMURRER AND RETURN TO ALTERNATIVE WRIT. §§ 2076, 2072, 2071, 2074, 2077, 2078, 2075.
3. ISSUES AND PROCEEDINGS THEREON. §§ 2080, 2081, 2079, 2082, 2083, 2084, 2085.
4. PRECEDENTS FOR PROCEEDINGS ON ALTERNATIVE WRIT.

SUB. 1. APPLICATION FOR ALTERNATIVE WRIT. § 2067.

§ 2067. Kinds of writ; how alternative writ granted.

A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor; and either with or without previous notice of the application, as the court thinks proper.

Affidavit on Which Alternative Writ Issued in First Instance.
(118 N. Y. 101.)

NEW YORK SUPREME COURT—COUNTY OF KINGS.

Re-application of Thomas R. Deverell, for a
writ of mandamus,

agst.

The Musical Mutual Protective Union.

} Affidavit.

COUNTY OF KINGS, ss. :

Thomas R. Deverell, being duly sworn, deposes and says: That he resides in the city of Brooklyn aforesaid, is a musician, and until the 31st day of July, 1885, was a member in good standing of The Musical Mutual Protective Union, a corporation duly incorporated by an act of the legislature of the State of New York, passed April 11th, 1864, and entitled, "An act to incorporate The Musical Mutual Protective Union," and the several acts amendatory thereof. That on or about the 21st

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day of July, this deponent had served upon him by leaving the same at his residence the paper hereto annexed, marked Exhibit "A."

That Article II. of the constitution of said Union is as follows, to wit :

" The object of this Union is to unite the instrumental portion of the musical profession, for the better protection of its interests in general, and the establishment of a minimum rate of prices to be charged by members of said society, for their professional services, and the enforcement of good faith and fair dealing between its members."

That deponent attended at the time and place specified in said Exhibit "A," and that then and there deponent was informed that the cause of the complaint being made against him was that he had written a letter to one Jules Levy. That deponent replied that the letter was a private one to that gentleman, that he could satisfactorily explain the matter, that he had violated no article of their constitution, and that he did not think that they, the Board of Directors of said Union, had anything to do with the matter ; and that he did not recognize that they had any jurisdiction to try the complaint against him for writing a private letter to any gentleman which did not affect the Union in the good faith and fair dealing existing between the members of the Union. That the members of the board of directors then present held a private consultation, and when they were through told him " that is all ;" that deponent then left the building and went to his house, believing from the action and talk of the board of directors that the complaint against deponent had been dismissed. That on or about the 28th day of July, one Edward Lovenn, a member of the said board of directors, met this deponent and informed him that as the board of directors had learned that one of the members of the board had some personal ill-feeling against deponent, the said directors had put him off the board, and that the board had adjourned the hearing on the complaint against deponent.

That the usual and customary manner of doing the business of said Union is to give the accused member notice of the time and place of adjournment, but that such notice was not given to deponent, and that deponent never had any notice, knowledge, or information of the time or place of said adjournment until the first day of August, 1895, when deponent received the paper hereto annexed, marked Exhibit "B."

That as appears by said Exhibit "B" deponent, in violation of his legal rights as a member of said Union, has been expelled therefrom to his serious damage and injury, and without any trial or opportunity to be heard in his defence upon the trial of the complaint against deponent, and that deponent has a good and substantial defence to said complaint upon the merits, as he is advised by his counsel, Jerry A. Wernberg, who resides at 285 Washington Avenue, Brooklyn.

That deponent in the business of his profession is obliged to hire a large number of musicians, and that deponent has information and verily believes to be true, that said Union intends to notify all members of said Union to cease working for or with deponent, and that great and irreparable injury will be done this deponent.

THOMAS R. DEVERELL.

(Acknowledgment.)

 Art. 5. Alternative Writ and Proceedings Thereon.

The alternative writ should demand the exact relief which is required, for the final peremptory writ if issued must follow the alternative writ upon the trial of which it is granted. See *Peo. ex rel. Uhrie v. Gilroy*, 60 Hun, 509, 15 Supp. 242. The alternative writ must allege the facts relied on and not mere conclusions of law, or it is bad upon demurrer. *Peo. ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 319, 15 Supp. 821. But, not all variations between the alternative and the peremptory writ will cause the latter to be set aside; if the substance of the two is the same, and they differ only in immaterial details, and where the act required is easier to be performed by the defendant under the requirements of the peremptory writ than it was under the requirements of the alternative writ, the peremptory writ will be sustained. *Peo. ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 157. In this case the authorities upon this subject are collated and thoroughly discussed. And it is held that the writ issuing to a corporation should point out in what the corporation has failed, and to direct particularly what it must do. *Peo. ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 157, *supra*.

The alternative writ granted in the first instance is in the nature of an order to show cause, and also stands as a pleading. *Peo. ex rel. Lester v. Mitchell*, 39 St. Rep. 768, 21 Civ. pro. 112, 15 Supp. 305; *Peo. ex rel. Ackerman v. Lumb*, 6 App. Div. 27. The alternative writ should set forth the facts upon which the relator bases his claim in the same manner, and with the same particularity as he is required to set them forth in a complaint. It should state facts, not conclusions of law, and all the facts should be stated in the alternative writ itself, because the court cannot look to the petition on which the alternative writ was granted to obtain the facts which should be stated in the writ itself. *Peo. ex rel. Egan v. Columbia Club*, 20 Civ. Pro. 323, 15 St. Rep. 821. But where the allegations of the petition upon which the alternative writ was granted are incorporated into and made part of the writ, the court held, upon appeal, that they were to be regarded as part of the writ itself in a case where the respondents have not been misled or harmed, and took issues upon those allegations. *Peo. ex rel. Witherbee v. Sup'rs of Essex*, 70 N. Y. 236.

On an application for a peremptory writ, it has been held that

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where tender was a condition precedent to the granting of the writ such tender should be set forth in the affidavit upon which the application was made. *Matter of McGrath*, 56 Hun, 78. If there be a want of averments in the alternative writ showing the title in relator to relief sought, the error may be taken advantage of at any time before the peremptory writ is awarded, even though the objection is not taken in the return to the alternative writ. *Peo. ex rel. Ryan v. Green*, 58 N. Y. 303.

Precedent for Alternative Mandamus in First Instance.

The People of the State of New York ex rel. CHARLES BRAY, Mayor of the City of Kingston, and LEWIS BEVIER, Supervisor of Marbletown, to the Board of Supervisors of the County of Ulster :

WHEREAS, It appears to us by the relation and complaint of Charles Bray, on behalf of the city of Kingston, and Louis Bevier, on behalf of the town of Marbletown, that the said city of Kingston and the said town of Marbletown have taken separate appeals from the action of the board of supervisors of the county of Ulster for the year 1886, equalizing the valuation of said city and town, and that said board of supervisors have passed a resolution levying and assessing upon the whole of said county of Ulster, including said town of Marbletown and city of Kingston, the sum of \$10,000 for the purpose of defraying expenses of said appeal and sustaining their said decision, and that no part of said sum ought to be levied and assessed on the said relators :

Now, therefore, we command you that immediately upon the receipt of this writ you strike the said sum of \$10,000 from the amount to be raised on the said county of Ulster, so far as the said city of Kingston and town of Marbletown are affected thereby, and so amend, modify, or reconsider your said action in so levying and assessing the same on the whole county, as that no part of said \$10,000 shall be levied and assessed on said town of Marbletown or the city of Kingston, or that you show cause why the command of this writ should not be obeyed, and that you make return to this writ pursuant to the provisions of § 2072 of the Code of Civil Procedure, at the office of the clerk of the Supreme Court in and for the county of Ulster, at his office in the city of Kingston, twenty days after the service thereof upon you.

Witness, Hon. Samuel Edwards, justice of the said court, at the [L. S.] court-house in Hudson, on the 20th day of December, 1886.

J. D. WURTS, Clerk.

By M. S. DECKER, Deputy.

Indorsed :—" Allowed this 20th day of December, 1886.

"SAMUEL EDWARDS,

"Justice Supreme Court."

Art. 5. Alternative Writ and Proceedings Thereon.

Alternative Writ in First Instance. (118 N. Y. 101.)

The People of the State of New York upon the relation of THOMAS R. DEVERELL *to The Musical Mutual Protective Union, greeting :*

WHEREAS, It appears by the affidavit of Thomas R. Deverell, the relator, that he is a resident of the city of Brooklyn ; that prior to the 31st day of July, 1885, he was a member in good standing of The Musical Mutual Protective Union, and that on the 31st day of July, 1885, the relator, without trial or opportunity to be heard in his defence of any charge or complaint, and that said union intend and propose to notify all musicians, members of said union, to receive no employment from or with the relator, and that said action of said union has actually caused great and manifest injustice to the relator ;

Now, therefore, we command you that, immediately upon receipt of this writ, you proceed to restore and reinstate the relator, the said Thomas R. Deverell, to all his rights, privileges, and benefits which, under the constitution and by-laws of the said Musical Mutual Protective Union, belong to a member of it in good standing, or that you show cause to the contrary before our Supreme Court at a Special Term thereof to be held at the Kings County court-house, in the city of Brooklyn, on the 17th day of August, 1885, at 10 o'clock of that day, or as soon thereafter as counsel can be heard.

And how you shall have executed this our writ make known to our Supreme Court, at a Special Term thereof to be held at the Kings County court-house, in the city of Brooklyn, on the aforesaid 17th day of August, 1885, at 10 o'clock on that day, or as soon thereafter as counsel can be heard.

And have you then and there this writ.

Witness, Hon. Joseph E. Barnard, Presiding Justice of our said [L. s.] Supreme Court, this 7th day of August, 1885.

EDWARD M. CULLEN,

Dated, August 7, 1885.

Clerk.

Indorsed:—"The within writ allowed this 7th day of August, 1885.

"JOSEPH E. BARNARD,

"Justice Supreme Court."

SUB. 2. DEMURRER AND RETURN TO ALTERNATIVE WRIT. §§ 2076, 2072, 2071, 2074, 2077, 2078, 2075.

§ 2076. Contents of alternative writ ; demurrer thereto.

The statement contained in an alternative writ of mandamus, of the facts constituting the grievance, to redress which it is issued ; the joinder therein of two or more such grievances ; and the command of the writ, are subject to the provisions of chapter sixth of this act, respecting the statement, in a complaint, of the facts constituting a cause of action ; the joinder therein of two or more causes of action ; and the demand of judgment thereupon. The person upon whom the writ is served, instead of making a return thereto, may file in the office where the writ is returnable a demurrer to the writ ; or he may file a demurrer to a complete statement of facts contained in the writ, as constituting a separate grievance, and make a return to the remainder of the writ. A demurrer may be thus taken, in a

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case where a defendant may demur to a complaint, or to a cause of action separately stated in a complaint, as prescribed in chapter sixth of this act; and it must be in like form.

§ 2072. [Am'd, 1895.] Writ; how returnable.

An alternative writ must be made returnable twenty days after the service thereof, at the office of the clerk of the county designated therein, in which an issue of fact joined thereupon is triable. A peremptory writ must be made returnable at a Special Term, or a term of the appellate division of the Supreme Court, designated therein, to which application for the alternative writ might have been made.

L. 1895, ch. 946.

§ 2071. Alternative writ; how served.

An alternative writ of mandamus must be served by showing the original writ, and delivering a copy thereof, to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that, where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman or other presiding officer, appointed pursuant to law; in which case service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer, upon whom a summons, issued out of the Supreme Court, may be served. Where one or more of the persons upon whom to make service, as prescribed in this section, cannot after due diligence be found, the exhibition of the original writ may be dispensed with, and service may be made upon him or them, as prescribed by law for the service of a summons, issued out of the Supreme Court.

§ 2074. [Am'd, 1895.] Return; how made.

The return to an alternative writ of mandamus must be annexed to a copy of the writ; and must be filed in the office of the clerk where it is returnable within the time specified in the writ. The return to a peremptory writ of mandamus must be likewise annexed to a copy thereof; and must, before the expiration of the first day of the term at which it is returnable, be either delivered in open court or filed in the office of the clerk of the county wherein the term is to be held.

§ 2077. Form and contents of return.

The provisions of chapter sixth of this act, relating to the form and contents of an answer containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counterclaim contained therein, apply to a return to an alternative writ of mandamus, showing cause against obeying the command of the writ. For the purpose of the application, each complete statement of facts, assigning a cause why the command of the writ ought not to be obeyed, is regarded as a separate defence, and must be separately stated, and numbered.

§ 2078. Further return cannot be compelled; demurrer to return.

A person, who has made a return to an alternative mandamus, cannot be compelled to make a further return. The people, or the relator, may demur to the return, or to any complete statement of facts, therein separately assigned as a cause for disobeying the command of the writ, on the ground that the same is insufficient in law, upon the face thereof.

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§ 2075. Motion to set aside writ.

An alternative writ of mandamus cannot be quashed or set aside upon motion, for any matter involving the merits. A motion to set aside such a writ, for any other cause, or to set aside or quash a peremptory writ of mandamus, or to set aside the service of either writ, must be made at a Term, whereat the writ might have been granted.

The writ of alternative mandamus is, when granted in the first instance, in the nature of an order to show cause. *People v. Rensselaer Common Pleas*, 3 How. 164; *People v. Canal Com.*, 10 Wend. 25. But also stands as a pleading. *People v. Ovenshire*, 41 How. 164; *People v. Ransom*, 2 N. Y. 490. It is for this reason that the order to show cause is usually preferred in the first instance, since it is drawn more readily, and does not require the care of a pleading. In *People v. Nostrand*, 46 N. Y. 375, it was held that where proceedings for a peremptory writ were commenced by an order to show cause containing the usual clause, "or for other relief," the court has power to grant any relief to which the party is entitled, though not that specified in the order. In the alternative writ, the relator must set forth the facts on which he relies, and it should contain no allegations except such as are pertinent to the relief asked, and the same certainty of statement is required as in a complaint. *People v. Supervisors of Westchester*, 15 Barb. 607; *People v. Ransom*, 2 N. Y. 490; *People v. Ovenshire*, 41 How. 164; *People v. Green*, 58 N. Y. 295. It is said the relator can only obtain the relief asked. *People v. Supervisors of Dutchess*, 1 Hill, 50; *People v. Supervisors*, 12 Barb. 446; see *People v. Nostrand*, 46 N. Y. 375. If the papers fail to show the relator's title, it is fatal even on appeal. *People v. Board of Appraisement*, 64 N. Y. 627; *People v. Green*, 58 id. 295. Where the relator takes no issue upon the allegations of defendant's affidavits, but proceeds to argument and asks for a peremptory writ, it is equivalent to a demurrer, it is an admission of the truth of the facts, but a denial of their sufficiency in law. *People v. Supervisors*, 73 N. Y. 173; *People v. Becker*, 3 State Rep. 202; *People v. Board of Apportionment*, 64 N. Y. 627; *People v. Cromwell*, 102 id. 477. And where the defendant takes no issue, he is regarded as demurring. *People v. Supervisors*, 103 N. Y. 541. Where a demurrer is made to a return, defendant may still have judgment, notwithstanding its insufficiency, if the writ is defective. *People v. Supervisors*, 32 Barb. 473. As to when direction in writ is sufficiently definite, see *People v. Rochester & S. R. R.*, 76 N. Y.

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294; *People v. Dutchess & Col. R. R. Co.*, 58 id. 152. Variance between declaratory and mandatory parts of alternative writ held amendable. *People v. Earle*, 47 How. 370. As to such variance, see *Green v. Dutchess & Col. R. R. Co.*, 58 N. Y. 152.

Two or more grievances may be joined in an alternative writ as so many causes of action, and the respondent may demur or make return to the writ, or he may file a demurrer to a complete statement of facts contained in the writ, as constituting a separate grievance, and make a return to the remainder of the writ. *Peo. ex rel. Neftaniel v. Order American Star*, 53 Supr. Ct. 69.

An alternative writ of mandamus is equivalent to a complaint in an action, and a demurrer thereto stands as a demurrer in an ordinary suit, and therefore if a substantial right is set out in the writ the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled. The court in awarding the peremptory writ may mould it according to the just rights of all the parties. *Peo. ex rel. Keene v. Suprs.*, 142 N. Y. 278.

The question whether mandamus is the proper remedy, or whether the relator has another legal remedy, are questions that should be raised on the return to the writ, and by a demurrer, as provided for by § 2076, and not by motion. *Peo. ex rel. Fulton v. Sup. of Oswego*, 50 Hun, 106, 3 Supp. 752. Section 2072 provides that the alternative writ should be returnable 20 days after the service thereof, at the office of the clerk of the county designated therein, in which the issue of fact is triable; and where such alternative writ is made returnable on a day certain, at a Special Term, instead of being made returnable in 20 days as required by this section, it was held to be irregular; but where the motion to set it aside on these grounds is made before the return day named in it, it is within the power of the court to amend it. *Peo. ex rel. Mullin v. Brotherhood of Stationary Engineers*, 19 Civ. Pro. 175, 12 Supp. 362; see, also, § 2075 of the Code, *ante*. The alternative mandamus should be served eight days before the day specified for showing cause. *Peo. ex rel. Wiswall v. Judges of Rensselaer*, 3 Howard Pr. 164. The objection that the writ is not made returnable at Special Term cannot be taken after a return is made. *Peo. ex rel. Argyle & Ft. Edward Plank Road Co. v. Com. of Highways*, 11 Howard, 89. See, under § 2072, *Peo. ex rel. Crouse v. Supervisors of Fulton County*, 70

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Hun, 563. A respondent may obtain an extension of time in which to make his return to the alternative writ of mandamus. See *Peo. v. Blackhurst*, 60 Hun, 63, 15 Supp. 114, and Code Civ. Pro. § 2089.

An alternative mandamus may be served after twelve o'clock noon, on a legal half holiday. *Peo. ex rel. Fulton v. Sup. Oswego*, 50 Hun, 106, 3 Supp. 752, 19 St. Rep. 24, 15 Civ. Pro. 379.

The difference between the old practice and the present practice under this section of the Code, regulating the form and contents of a return, is discussed in *Peo. ex rel. McMackin v. Board of Police*, 46 Hun, 299, 11 Supp. 403. The court says: "As the practice was followed in the early administration of the common law, an inferential denial of this description would not have been permitted. There the utmost particularity and precision were required to be observed, and the reason upon which the rule was founded was that the return when it was made became conclusive and could not be questioned in that proceeding, but the remedy of the relator, if it was not true, was to bring an action against the respondent for damages for making a false return, and it was of the utmost consequence to him in maintaining such an action that the return should be precise, positive, and unequivocal. But this has been changed by statute, and for many years it has been the practice to allow the relator to take issue upon the return and to have a trial of the facts the same as might be had in any other litigation. The same strictness in the return has accordingly ceased to be necessary, and it has now been made analogous to pleadings in other actions. This was considered in *Springfield v. Comm. of Hampden*, 10 Pick. 59, where it was held as the result of the more recent authorities that a return is sufficient if it contains a full and certain answer to the allegations expressly made, and discloses a fair legal reason why the mandamus should not be obeyed. This rule, still further liberalized, has found its way into the Code of Civil Procedure, for by § 2077, the provisions of chap. 6, relating to the form and contents of an answer containing denials or allegations of new matter except those relating to the verification and counterclaim, apply to a return to an alternative writ of mandamus showing cause against obeying the command of the writ; and the provisions of the Code concerning the answer in an ordinary litigation are such as to permit inferential or argumentative pleading; and as that is

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permitted in other litigations, it may be equally allowed in the answer to an alternative writ of mandamus."

This case further holds that where a board of police and the individual members thereof are both made parties respondents to a writ of mandamus all of them are not only at liberty to make a return thereto but it is their duty to do so. *Peo. ex rel. McMackin v. Board of Police*, 46 Hun, 299, 11 Supp. 403, affirmed, 107 N. Y. 235. See, also, *King v. Bailey*, 1 Keble, 33, cited in the above case, where it was held, that where a mandamus issued to the aldermen, bailiffs, and commonalty of a municipal corporation, that one part of said corporation might make one return, and the other part might make another return upon the ground that these different portions are attributes of the corporation made parties to the writ.

A return in which the affiant stated that he has no knowledge or information sufficient to form a belief as to the truth of positive statements of the affidavit of the relator does not raise an issue. *Peo. ex rel. Andrews v. McGuire*, 29 St. Rep. 674, 8 Supp. 852, reversed on another point, 126 N. Y. 419, 38 St. Rep. 444. Compare, also, *Matter of Freel*, 89 Hun, 80, 35 Supp. 59; *Peo. v. Sutton*, 88 Hun, 175, 34 Supp. 487; and *Peo. ex rel. Anibal v. Board of Suprs.*, 53 Hun, 255, 6 Supp. 591, in which cases the respondent's affidavits were held not to raise an issue, as being upon information and belief, etc., but note that they were held to be defective upon a motion for a peremptory writ of mandamus in the first instance.

The return to an alternative writ of mandamus must deny the material facts stated in the writ, or some of them, or allege other and additional facts, which in law would defeat relator's claim. *People v. Supervisors*, 32 Barb. 473; *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25; *People ex rel. v. Supervisors*, 14 Barb. 52; *People ex rel. v. Commissioners*, 11 How. 89. The return should conform to the rules of pleading and be positive rather than argumentative and evasive, and the familiar rule in pleading that the evidence should not be set out, should be followed. *People v. Ransom*, 2 N. Y. 496; *People v. Baker*, 35 Barb. 105; *People v. Supervisors*, 18 How. 152; *Matter of Trustees of Williamsburgh*, 1 Barb. 34. Any number of facts constituting valid reasons for not performing the act which the writ seeks to compel may be averred. *People v. Supervisors of Ulster*, 32

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Barb. 473. An equivocal return, or one pleading a statute, but substantially departing from the requirement of the statute, is not enough. *People ex rel. Waller v. Board of Supervisors*, 56 N. Y. 249.

Where an allegation in the affidavit of relator in proceedings for mandamus was not put in issue by the return by a positive denial, but only upon information and belief, it was held, that this was not sufficient, but it should have been certain, and of such a nature as, if false, would have permitted of a remedy by action. *People ex rel. Kelly v. Common Council of Brooklyn*, 77 N. Y. 503. This decision was made in 1879, under the old Code. Where the allegations in the return were positive and those in the affidavit of relator on information and belief, the writ was denied. *People v. Green*, 1 Hun, 1. In fine the return must, as is said by Bockes, J., in 35 Barb. 105, be good, tested by the ordinary rules of pleading, both in form and substance. The remedy for a bad pleading in a return is motion to strike out as surplusage or other pertinent ground. An allegation as to matter of law is not proper in the return, which should only set out facts, not legal principles, and where the statements of fact are outside of the issue and irrelevant to it and contain more than a substantial statement of the relevant facts, they are not proper. *Peo. v. Ransom*, 2 N. Y. 496; *Peo. ex rel. v. Commissioners*, 11 How. 89. The return has in practice been verified, as it is an answer to a writ granted on a verified petition, but the section does not seem to require it. Where fraud or collusion are set up in the return to avoid relator's case, the facts should be fully pleaded. *People v. Schuyler*, 51 How. 461. On return to an alternative writ facts material to the issue occurring after the granting of the writ may be pleaded. *People v. Baker*, 14 Abb. 19. In *People ex rel. v. Board of Assessors*, 7 Hun, 228, it was held that where the writ was granted on facts positively averred in the affidavits, and the defendant in the return made denial on information and belief, that it amounted to nothing, that the form of denial was used in pleading to raise an issue, but not for any other purpose. This must be considered in connection with the fact that the present section does not seem to require a verification. Before the Code it was held the court might require a verification or not, and that it need not be signed by the party making it; and if made by a corporation, need not be signed by

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the head of it, or sealed by the corporate seal. *Fish v. Weather-wax*, 2 Johns. Cas. 215. The making of a false return renders the deponent liable for damages occasioned thereby. In *People v. Supervisors of Richmond*, 28 N. Y. 112, where supervisors had made a false return to a writ sued out by an individual, and the relator had thereby been deprived of damages against a town, the supervisors were held liable for damages to the extent of interest on the amount of damages finally assessed. A mandamus will issue to compel a judge to sign a bill of exceptions, but not to settle it in a particular manner when there is a dispute as to the incidents of the trial. *Tweed v. Davis*, 1 Hun, 252. For precedent for return to alternative writ, see § 2082.

The provision as to demurring is in accordance with *People ex rel. v. Baker*, 35 Barb. 105. There is no provision in the Code to compel a return, and it seems unnecessary, as the command of the writ is to perform the act or show cause to the contrary; and in case of failure to do either, the defendant is liable for a contempt upon the issuing of a peremptory writ and failure to obey its direction.

As an alternative writ of mandamus has the character of a complaint in an action, it may be demurred to with like effect as upon a demurrer to a complaint. The demurrer of the relator to the defendant's return subjects the writ to criticism for the purpose of seeing whether it states facts sufficient to support the relief sought. If it does not, the demurrer to the defendant's return requires no consideration. *People ex rel. McGuire v. Bricklayers' Union*, 20 App. Div. 9.

The alternative writ is a pleading and must stand or fall on the sufficiency of its own recital of facts. Therefore, on demurrer to the alternative writ, resort cannot be had to the petition or affidavits for facts to sustain it. *People ex rel. Decker v. Parmelee*, 22 Misc. 384. In general the statements upon information and belief in affidavits in opposition to the motion for peremptory mandamus are not effectual to defeat a motion founded upon positively sworn statements, but this rule does not apply to proceedings instituted by the alternative writ, for then issues are presented and tried the same as in actions. *People ex rel. McGuire v. Bricklayers' Union*, 20 App. Div. 11.

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Precedent for Demurrer to Alternative Writ.

(Title.)

The defendant herein demurs to the alternative writ of mandamus heretofore served, on the grounds,

First.—That there is an improper joinder of parties as relators.

Second.—That the causes of action or matters set out as the grounds for the writ are improperly joined.

Third.—That the facts set out in the affidavit of relators are insufficient to entitle them to the relief asked, or to any relief by way of mandamus.

H. CHIPP, JR.,

Attorney for Defendant.

Precedent for Return to Alternative Writ.

(Title.)

The defendant making return to the alternative writ of mandamus, heretofore served, shows to the court that the command of the writ has been fully complied with and obeyed, in that the sum of \$10,000 levied and assessed on the county of Ulster, for the purpose of paying on the part of Ulster County the expenses of the assessment taken by the town of Marbletown and the city of Kingston, has been stricken from the sum to be levied on the county at large, and no part of said sum is now levied or assessed against said town or city.

THE BOARD OF SUPERVISORS OF ULSTER COUNTY,
By HOWARD CHIPP, JR., *its Attorney.*

(Add verification by chairman.)

While a further return cannot be compelled, the relator can undoubtedly make a supplemental return under § 544 Code Civ. Pro. See *Peo. ex rel. N. Y. Underground Ry. Co. v. Newton*, 19 Civ. Pro. 416. A writ of mandamus will not be set aside for failure of the clerk to enter the order upon which it was granted. *Peo. ex rel. Gaylord v. Suprs. of Schoharie County*, 15 Supp. 795. The alternative writ cannot be quashed or set aside upon motion, for any matter involving the merits, and the persons to whom it is directed must either make a return to it or demur. *Peo. ex rel. Fisk v. Deverman*, 83 Hun, 183, 64 St. Rep. 147, 31 Supp. 593. A peremptory writ must command precisely what, and no more than the party to whom it is directed is legally required to do, and if it requires more, the court may in its discretion quash the writ or it may allow the same to be amended under §§ 721, 722, and 723, and 1997, Code Civ. Pro. *Peo. ex rel. Hasbrouck v. Suprs.*, 135 N. Y. 533.

A party must be served with a writ and have had an opportunity

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under § 2075 of the Code, to make any of the motions indicated in that section, or make or refuse to make a return to the same before he can be adjudged guilty of a contempt; so held by Mayham, J., dissenting in *Peo. ex rel. Platt v. Rice*, 80 Hun, 454, 62 St. Rep. 289, 30 Supp. 457. Whether mandamus is the proper remedy, or whether the relator has another legal remedy, are questions which involve the merits, and thus such questions should be raised by a return to the writ or by a demurrer, as provided by § 2076, and not by a motion to quash the writ. *Peo. ex rel. Fulton v. Sup. of Oswego*, 50 Hun, 106, 3 Supp. 752, 15 Civ. Pro. 379. As the respondent cannot move to quash an alternative writ for any matter involving the merits, he must either make a return thereto or demur. If he deems the facts stated in the writ insufficient to entitle the relator to relief, he should demur. If the facts are stated untruly, he must make a return to the writ; and as the respondent cannot quash the writ by motion, for matters involving the merits, he is precluded from accomplishing the same object by an appeal. *Peo. ex rel. Fisk v. Devermann*, 83 Hun, 183, 64 St. Rep. 147, 31 Supp. 593. An alternative mandamus is in the nature of an order to show cause, and no appeal lies from an order granting it. It does not affect a substantial right, because it determines nothing against the respondent or in favor of the relator, and it cannot be quashed or set aside for any matter involving the merits. *Peo. ex rel. Ackerman v. Lumb*, 6 App. Div. 27.

A peremptory writ of mandamus must be quashed where no notice of application therefor has been given as required by § 2070 Code Civ. Pro. *Peo. v. Board of Canvassers Dutchess County*, 48 St. Rep. 533, 64 Hun, 634, 18 Supp. 302. The failure to make and enter a formal order on the granting of the alternative writ is no ground for setting aside the mandamus, as the entry of the order is a mere clerical duty, and it will be allowed to be entered *nunc pro tunc*. *Peo. v. Board of Supvrs. Schoharie County*, 15 Supp. 795, 61 Hun, 622, 40 St. Rep. 66.

SUB. 3. ISSUES AND PROCEEDINGS THEREON. §§ 2080, 2081, 2079,
2082, 2083, 2084, 2085.

§ 2080. Application of certain provisions of chapter sixth.

Oral pleadings upon a writ of mandamus are abolished, and no pleadings are allowed, except as prescribed in the foregoing sections of this article. The provisions of title second of chapter sixth of this act apply to the writ and the return; except

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that it is not necessary to serve a copy of either, upon the attorney for the adverse party, or to verify either, and that neither can be amended, without special application to the court, or stricken out as sham.

Title second of chapter sixth is entitled "Pleadings in Courts of Record," including counterclaims, and includes §§ 478 to 546.

§ 2081. Service of notice of filing return, and demurrer.

Where a return to an alternative writ of mandamus has been filed, the attorney for the defendant making it must serve, upon the attorney for the people or the relator, a notice of the filing thereof. Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant, within twenty days after the service of such a notice. Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator, within the time prescribed by law for filing it.

§ 2079. Issue of fact; when it arises.

An issue of fact arises upon a denial, contained in the return, of a material allegation of the writ, or upon a material allegation of new matter, contained in a return; unless a demurrer thereto is taken. Where the people or the relator demur to a complete statement of facts, separately assigned as cause for disobeying the command of the writ, an issue of fact arises, with respect to the remainder of the return.

§ 2082. Subsequent proceedings the same as in an action.

Except as otherwise expressly prescribed in this act, the proceedings after issue is joined, upon the facts or upon the law, are, in all respects, the same as in action; and in each provision of this act, relating to the proceedings in an action, apply thereto. For the purpose of the application, the writ, the return, and the demurrer are deemed to be pleadings in an action; and the final order is deemed to be a final judgment, and may be entered and docketed, and enforced, with respect to such parts thereof as are not enforced by a peremptory mandamus, as a final judgment in an action. But before the final order can be docketed, or an execution issued thereupon, an enrolment must be filed thereupon, as a judgment roll in an action. For that purpose, the clerk must attach together and file in his office, a certified copy of the final order; the writ and the return, or copies thereof, together with the same papers, which are required by law to be incorporated into a judgment roll in an action. Where the final order is in favor of the people or the relator, it must award a peremptory mandamus, to be forthwith issued.

2 R. S. 586, § 55 and part of § 57 (2 Edm. 608); Co. Proc. § 471.

§ 2083. Issue of fact; how triable.

An issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury, as if it was an issue joined in an action specified in § 968 of this act; unless a jury trial is waived, or a reference is directed by consent of parties. Where the writ was issued upon the relation of a private person, the relator or the defendant is entitled to a verdict, report, or decision, where he would be entitled thereto, if the issue was joined in an action, brought by the relator against the defendant, to recover damages for making a false return.

§ 2084. [Am'd, 1895.] Id.; where triable.

An issue of fact, joined upon an alternative writ of mandamus, granted at a special term of the Supreme Court, is triable in the county, wherein it is alleged in the writ,

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that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, joined upon an alternative writ of mandamus, granted at a term of the appellate division of the Supreme Court, is triable in the county which determines the judicial department wherein the application for the writ must be made; unless the appellate division directs it to be tried in another county of the same judicial department. Upon the trial of an issue of fact, joined upon an alternative writ of mandamus, the verdict, report, or decision must be returned to, and the final order thereupon must be made by, the appellate division or the Special Term, as the case requires.

L. 1895, ch. 946.

§ 2085. [Am'd, 1895.] Issue of law upon General Term* mandamus; how and where triable.

An issue of law, joined upon an alternative writ of mandamus, granted by the appellate division, must be tried, and the final order thereupon must be made, by the appellate division.

By the old practice under the common law, the relator was not permitted to traverse the return notwithstanding that it might be false in fact, and the remedy was either by an action on the case for a false return, or if the matter concerned the public, by indictment of the person making the false return. *Fish v. Weatherwax*, 2 John. Cases, 217, note, § 63. But subsequently it was provided by statute, that whenever a return was made to a writ of mandamus, the relator might demur or plead to all or any of the material facts contained in the return, to which the person making the return must reply, take issue, or demur, and proceedings were had thereon as if the relator had brought his action on the case for a false return. The provisions of the R. S. was stated by Sutherland, J., as follows: "Although these statutes contemplate formal written pleadings in the ordinary mode of conducting suits, the practice of the court is virtually to allow pleadings *ore tenus*; that is, the relator is permitted to discuss the return and to ask for a peremptory mandamus, and whilst he does not put in a formal demurrer, the case is considered as embraced in the description of non-enumerated business, and is to be heard as such; but if a formal demurrer is interposed, it becomes enumerated business and can be heard only at the stated terms. It is optional with the relator whether it shall be considered enumerated or non-enumerated business, unless the court specially direct formal pleadings to be interposed." *People ex rel. Bentley Comm. of Highways*, 6 Wend. 560. But the Code Civ. Pro. has made new and sweeping changes. Oral pleadings

* So in original.

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are abolished by § 2080, and no pleadings are allowed except those provided by §§ 2067 and 2079; that is to say, the writ, which fulfils the office of a complaint, the return, which fulfils the office of an answer, and a demurrer by the defendant to the writ, or demurrer by the relator to the return. Thus it is seen that there is no provision made for a reply to the return, and that such reply is no longer necessary under § 2079, and is even prohibited by § 2080. Mr Throop said, in a note to § 2079, that the effect of the section is to dispense with a reply.

And thus the return is to be treated in all respects like an answer to a complaint under § 964; and it seems that as an answer containing a counterclaim requires a reply under § 514, that therefore no counterclaim can be set up in the return to the alternative writ of mandamus. *People ex rel. Neftaniel v. Order American Star*, 53 Supr. 66. See in the case last cited a full discussion by Freedman, J., of the former and present practice on the return to the alternative writ. The old rule that the relator, unless he demurred to the return to the alternative writ, was bound to plead and reply to it, and that unless he so pleaded, the return was to be taken at the trial as true, has been completely abrogated. *Peo. ex rel. Neftaniel v. Order American Star*, 53 Supr. 70. Note also that § 2077, applying the provisions of chap. 6, Code Civ. Pro., to mandamus, excepts those provisions relating to a counterclaim. In this section the Code abolishes oral pleadings upon a writ of mandamus, and again states the provisions of title second, chap. 6, of the Code Civ. Pro. already made applicable by §§ 2076 and 2077, except, however, that it is not necessary to serve a copy of either the writ or the return thereto upon the attorney for the adverse party, nor is it necessary to verify either. It was held that under this section there was a proper averment of the presentation of an application to the comptroller under chap. 448, Laws 1885, when the petition stated that the applicant "duly made application to the comptroller under and in pursuance of the provisions of chap. 448, Laws of 1885, and as authorized thereby, and by law to cancel said tax sales, and the comptroller, upon said application and the papers presented therewith, did by proper order and decision duly cancel, annul, and set aside said sales as wholly illegal and void." *Peo. ex rel. Harris v. Commissioners*, 90 Hun, 530. Certain criticisms by the relator upon the verification of the return of the respondent were held to be not well taken under the pro-

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visions of this section; but it is not stated in the case what these criticisms were. *Pco. ex rel. Cosford v. Suprs. of Niagara Co.*, 38 Supp. 967, 15 Supp. 682.

A return may contain two or more statements of fact, assigning cause why the mandate of the writ should not be obeyed, and those complete statements are regarded as separate defences and must be separately stated and numbered. *Pco. ex rel. v. Order American Star*, 53 Supr. 66. For a complete collation of authorities upon the application of title second of chap. 6, Code Civ. Pro., to the writ of mandamus and to the return thereto, see cases cited under §§ 2076 and 2077. It was held in *People v. Board of Metropolitan Police*, 26 N. Y. 316, that if the relator took issue upon the facts in a return, he could not afterward question their sufficiency as matter of law, and that if the verdict is against him on the facts the writ must be refused. This was under the practice requiring either a demurrer or plea, and as the necessity for a plea is abrogated by this section and an issue of fact raised on the alternative writ and return, it is more than doubtful whether a mere omission to demur would concede the sufficiency of the return as matter of law, and prevent the relator on the trial from insisting that the facts stated in the return did not constitute a defence. A relator who takes no issue on the affidavits of defendant but asks for a peremptory writ is regarded as interposing a demurrer. *People v. Supervisors*, 73 N. Y. 173; *People v. Board of Apportionment*, 64 id. 627; *People v. Becker*, 3 State Rep. 102; *People v. Cromwell*, 102 N. Y. 477. The averments of the writ cannot be supported by the papers on which it is granted. *People v. Supervisors*, 15 Barb. 607; *People v. Baker*, 14 Abb. 19; S. C. 35 Barb. 104.

But the *People v. Board of Police*, 26 N. Y. 316, *supra*, seems to be limited by *People ex rel. D. W. & P. R. R. Co. v. Bachellor*, 53 N. Y. 138, where the court approves *The Commercial Bank of Albany v. The Canal Commissioners*, 10 Wend. 25, stating that this latter case gives the correct rule, which is that, "at any time after the return and before the peremptory mandamus is awarded, the defendant may object to the want of sufficient title in the relator to the relief sought, or show any other defect in substance, though he cannot after return object to defects in form."

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See, also, to the same effect *People ex rel. Ryan v. Greene*, 58 N. Y. 305, reversing 5 Daly, 254, and affirming 46 Howard, 169.

Where the respondent, in his return to the alternative writ, bases his defence upon one ground, he is then estopped from setting up other defences. Thus, where a comptroller was a defendant in mandamus proceedings seeking to require him to lease from the relator certain premises as directed by the common council, and he set up as his defence that there was no appropriation to pay the rent, *held*, that he was estopped from claiming that it was not his duty to execute the lease, or, that the common council had no authority to require him so to do. *People ex rel. Schanck v. Greene*, 64 N. Y. 503, reversing 6 Hun, 11. It was held upon the return of an order to show cause why mandamus should not issue that the relator held the affirmative on the argument. *Peo. v. Throop*, 12 Wend. 185, note. And upon the trial of issues raised by the return to the alternative writ, the burden of proof would without question follow the ordinary course in actions. On a demurrer by the defendant to the alternative writ, the demurrer will be sustained unless the writ sets forth the facts upon which the relator bases his claim in the same manner and with the same particularity as he is required to set them forth in a complaint. Facts, not conclusions of law, must be stated. *Peo. ex rel. Egan v. The Columbia Club*, 20 Civil Pro. 323, 15 Supp. 821. But on demurrer sustained, the relator may amend on payment of costs. *Peo. ex rel. Egan v. The Columbia Club*, 20 Civ. Pro. 323, 15 Supp. 821. All the material allegations of the alternative writ, which are not traversed or denied, or successfully avoided, are to be taken as admitted, and if the return contains no sufficient answer, the relator is entitled to his peremptory writ. *Peo. ex rel. Sunderlin v. Ovenshirc*, 41 Howard, 164. Where the respondent demurs to one or more, but not to all, of the complete statements of facts in the writ, a return may be made to those not demurred to; and if the relator demurs to one or more but not to all of the complete statements of facts contained in the return, an issue of fact arises with respect to the remainder of the return. *Peo. ex rel. v. Order of American Star*, 53 Supr. 66. The affidavits upon which the writ is granted form no part of the record, and the relator who holds the affirmative cannot support the writ by his preliminary affidavit. *Peo. ex rel. v. The Columbia Club*, 20 Civ. Pro. 323; 15 Supp. 821, citing *Peo. v.*

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Baker, 35 Barb. 109; see, also, *Pco v. Board of Suprs. of Westchester*, 15 Barb. 614. But compare *Pco. ex rel. Whiterbee v. Suprs.*, 70 N. Y. 236. Issues of law are to be raised by demurrer to the writ, or to the return, or to any complete statement of facts contained in the writ, as constituting a separate grievance, or to any complete statement of facts separately assigned in the return as cause for disobeying the command of the writ. *Pco. ex rel. v. Order of American Star*, 53 Supr. 66. Compare with this section § 964, Code Civ. Pro., stating when issues of law and issues of fact arise. Note that under this section, when the relator demurs to one complete statement of facts set out in the return as a cause for disobeying the writ, an issue of fact arises with respect to the remainder of the return.

The relators hold the affirmative of the issue. *People v. Tyner*, 24 Barb. 348. When issues upon the return to a writ of alternative mandamus are submitted to a jury the jury may render a general verdict, instead of finding on the specific issues; such a verdict is a finding in favor of the party upon each of the issues made; and in case such a verdict is directed by the court it will be presumed to have been rightfully directed in the absence of any evidence to the contrary; and when there is no evidence upon an issue before the jury, or the weight of evidence is so decidedly in favor of one side that the court would set aside the verdict as against evidence, if rendered, it is the duty of the judge to direct the jury what verdict to render. *People v. Board of Metropolitan Police*, 35 Barb. 644. Where, upon application for a peremptory mandamus on a false return, the material issues were found in favor of plaintiff, the court held that the judgment should be that a peremptory mandamus issue to the defendants, commanding them to audit a claim as commanded by the alternative writ. *People v. Supervisors of Richmond*, 28 N. Y. 112. It was held under former Code, in 35 Barb. 644, on appeal, 26 N. Y. 316, that although issue of fact had been tried by a jury, the court may grant or refuse the writ, as it deems proper. Where the fact on which the right to a peremptory mandamus depends is controverted, the issue must be tried before the peremptory writ can issue, and the trial must not be on conflicting affidavits, but by a jury. *People v. Green*, 1 Hun, 1. But if the return shows the examination of a long account is involved, a compulsory reference may be ordered. *People v. Wadsworth*, 61 How. 57.

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All the material allegations of the alternative writ not traversed, denied, or avoided, are to be taken as admitted, and if the return contains no sufficient answer, the relator is entitled to the writ. *People v. Ovenshirc*, 41 How. 164. This is of course subject to the rule that the relator is not entitled to a peremptory mandamus, even upon a verdict in his favor on issue joined on return to an alternative writ, when the record shows he has no legal right thereto on the facts. *People v. Batchellor*, 53 N. Y. 128, limiting, *People v. Metropolitan Police*, 26 id. 316. The defendant can at any time before the peremptory writ object to any defect of substance. *Id.*; *People v. Green*, 58 N. Y. 295; *Commercial Bank v. Canal Commissioners*, 10 Wend. 25. A public officer, who, in his return, bases his resistance to the payment of a claim on one ground, is estopped from setting up others. *People v. Green*, 64 N. Y. 699. The death of one of several copartners does not abate the writ when they are petitioners, and it occurs after return. *People v. Supervisors*, 70 N. Y. 228.

The peremptory writ must follow the terms of the alternative writ, and where the final peremptory writ requires of the respondent acts of a different nature and greater than those required by the alternative writ, the variance is fatal, and the writ will be dismissed upon appeal. *Peo. ex rel. v. Gilroy*, 60 Hun, 507, 39 St. Rep. 526, 15 Supp. 242.

But it was subsequently held in *Peo. ex rel. Keene v. Supvsrs.*, 142 N. Y. 278, that the court, in awarding the peremptory writ, may mould it according to the just rights of all the parties; so held upon a demurrer to an alternative writ. The respondent contending that the relator asked too much, the court said: "The alternative writ is now equivalent to the complaint in an action, and the demurrer and return stand as a demurrer or answer in an ordinary suit. If a substantial right is set out in the writ the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled." And again in *Peo. ex rel. Greene v. D. & C. R. R. Co.*, 58 N. Y. 157, it was said, that not every variance between the alternative and the peremptory writ of mandamus will cause the latter to be set aside. Where the substance of the two writs is the same, both commanding the doing of the same act but differing in some immaterial matter of detail, as to the method of doing it, and where the act is one the defendant is legally

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obligated to do, and the variance is to his ease, not to his distress, the peremptory writ will be sustained. See, also, *Peo. ex rel. Henry v. Nostrand*, 46 N. Y. 377, where, upon a motion for a peremptory writ, it was held that the court could issue the peremptory writ, for any relief to which the relator was entitled, although not specified in the moving papers, if those papers contained the usual request "or for other relief." Query. As to whether this course would have been followed if an alternative writ had issued first, and the case been heard upon issues of law and fact joined upon the return. *Peo. ex rel. Henry v. Nostrand*, 46 N. Y. 377.

Where a peremptory writ is issued to compel a common carrier to perform its duties, it should require the company to exercise its franchise and to receive and transport freight upon such terms as are reasonable and usual and to perform its duties as a common carrier. *Peo. v. N. Y. C. & H. R. R. Co.*, 28 Hun, 559; *Peo. v. N. Y. C. & H. R. R. Co.*, 3 Civ. Pro. 11, reversing 2 Civ. Pro. 82, 63 Howard, 291. In this case at Special Term, it was held that the peremptory writ when issued should clearly and distinctly state the act or duties which are by it commanded to be performed, so that the party to whom it is addressed may distinctly understand what he is to do; but the General Term held it sufficient for the writ to require the common carrier to resume its duties as such, and that there was no necessity for the writ to specify what kind of goods should be received and carried, etc. *Peo. ex rel. Hofman v. Tedcastle*, 12 Misc. 468, 68 St. Rep. 135, 34 Supp. 257. It was held that a peremptory writ issuing to a corporation, having a discretion as to the manner of performing the duty, should point out in what the corporation has failed, and direct particularly what must be done, so that it may not fail again. *Peo. ex rel. Greene v. D. & C. R. R. Co.*, 58 N. Y. 157. As to when the mandatory part of a writ of mandamus was held to be sufficiently definite and capable of being obeyed, see *Peo. ex rel. Garbutt v. R. & S. L. R. R. Co.*, 76 N. Y. 298. When the peremptory writ issues, it must command precisely what, and no more than, the party to whom it is directed is legally required to do. If it requires more, the court on application may quash or amend it in its discretion; and the exercise of such discretion is not reviewable in the Court of Appeals. *Peo. ex rel. Hasbrouck v. Supers.*, 135 N. Y. 533.

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As the Statute of Limitations applies in proceedings by mandamus, the writ should enforce only those parts of the relator's claim which are enforceable under such statute. See *Pco. ex rel. Byrne v. French*, 12 Abb. N. C. 158. The mandatory part of the writ need only describe the thing to be done with reasonable certainty, so that the defendant will know what is required of him. *Pco. ex rel. Henry v. Nostrand*, 46 N. Y. 378. Under the act of 1886, providing for a review of the acts of the excise board by mandamus, the issues are left to the court, and it is for the court to decide in a summary way, whether the excise board acted arbitrarily, and abused their power; the framing of issues for trial by jury is not contemplated by the act of 1886, and cannot be permitted. *Pco. ex rel. Ketcham v. Excise Comms.*, 46 St. Rep. 41, 18 Supp. 621, 64 Hun, 632. Where a jury trial is not waived nor a reference consented to, the issues raised by the return to the alternative writ must be tried by the jury as if they were issues joined in an action specified in § 968; and under § 2083 either party is entitled to a verdict when he would be entitled thereto if issue were joined in an action to recover damages for making a false return. *Pco. ex rel. Neftaniel v. Order American Star*, 53 Supr. 71. The issue arising on the return to the alternative writ may be brought on for trial in the same manner in which the issues of fact joined in an ordinary case are usually brought on, and it is not necessary to have the issues distinctly and plainly stated for trial on the motion made under § 970, or under the general rules of practice. *Pco. ex rel. Neftaniel v. Order American Star*, 53 Supr. 72.

As by § 2082, each provision of the Code Civ. Pro. relating to the proceedings in an action applies to a trial of issues upon an alternative writ, it follows that a jury may render a general verdict under § 1178, Code Civ. Pro., or they may be directed to file specially upon any or all of the issues. *Pco. ex rel. Neftaniel v. Order American Star*, 53 Supr. 72. A verdict upon the trial of an alternative writ must be returned to, and the final order thereupon must be made by, the Special Term as provided by § 2084, and the final order is to be deemed a final judgment and is to be entered and docketed and enforced as prescribed by § 2082. *Pco. ex rel. Neftaniel v. Order American Star*, 53 Supr. 73.

Where certain owners of a manufactory advanced money to a sheriff to hire deputies to enable him to protect their property,

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and the sheriff subsequently assigned his claim against the supervisors, for the sum thus advanced to the owners of the manufactory, it was held that where the return denied that the employment of the deputies hired was necessary, that an issue of fact was raised which should have been tried by a jury, and that it was error for the court to direct a verdict. *Peo. ex rel. Nicholas v. Suprs.*, 60 Hun, 387, 39 St. Rep. 863, 15 Supp. 471.

Where issues of fact arise, only the alternative writ can issue, and the issues raised thereon must be determined by a jury under § 2083, Code Civil Procedure, unless a jury trial is waived or a reference is directed by consent. The case of *Peo. ex rel. Delmar v. St. Louis R. R. Co.*, 44 Hun, 552, should not be taken as authorizing the court to order a reference as to a disputed fact. It is to be taken only as holding that the court may require a reference upon the return to a peremptory writ for its own information. *Peo. ex rel. Hofman v. Tedcastle*, 12 Misc. 469-470, 68 St. Rep. 135, 34 Supp. 257. Under the provisions of the Revised Statutes regulating procedure by mandamus (2 R. S. 587, § 57), providing that where issue is taken upon a return to a writ of alternative mandamus, in case a verdict shall be found for the relator, he shall recover damages and costs in like manner as in an action, etc., and that a peremptory writ shall be granted to him without delay, it was held that such verdict did not entitle the relator to a peremptory writ where the record shows that he had no legal right thereto. *Peo. ex rel. D., etc., R. R. Co. v. Batchellor*, 53 N. Y. 137. The statement in § 2082, that the "final order" is to be deemed a final judgment is not restricted to the final order awarded on the hearing of the alternative writ, but will be taken to cover the order awarding a peremptory writ by motion in the first instance, and therefore the relator is entitled to have his damages awarded under § 2088 of the Code Civ. Pro., where a peremptory writ was issued in the first instance. *Peo. ex rel. Goring v. Wappinger Falls*, 151 N. Y. 388, reversing same case 91 Hun, 317, 13 Misc. 732, 69 St. Rep. 592. The opinion of the lower court may be referred to for a statement of the practice under the common law, and the changes made therein by the Code of Civ. Pro.

The rules relating to discretionary orders in actions apply also to proceedings by mandamus; so held upon one applying to be

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let in as a party to a peremptory writ. This decision apparently rests upon a construction of that portion of § 2082 which states that "each provision of this act [Code Civ. Pro.] relating to the proceeding in an action applies" to the trial of an alternative writ. *In re Bohnet v. The Mayor, etc., of New York*, 150 N. Y. 280.

When the relator upon an alternative writ of mandamus moved at the close of the trial upon the writ and return and supplementary return thereto and upon the findings of fact, for a peremptory writ, it was held, that when upon the whole case the right of the relator to the relief demanded is doubtful, the application for the peremptory writ should be denied. *Peo. ex rel. N. Y. Underground Ry. v. Newton*, 19 Civ. Pro. 417. It has been held that when parties by the adoption of an agreed statement of facts move for a peremptory writ in a case in which, but for such agreed statement of facts, an alternative writ would be necessary, that the motion must be deemed a special proceeding and not an action, and that therefore the right to costs are discretionary. *Peo. v. N. Y., L. E. & W. R. R. Co.*, 47 Hun, 44. A verdict on the issues raised by an alternative writ of mandamus should not be disregarded in the absence of a motion for a new trial, in a case where, though the evidence is conflicting, there is ample evidence to sustain the verdict; and it was also held that it was not ground for setting the verdict aside because the jury, in answer to a question they put to the court as to whether the court would be absolutely bound by the verdict, were told that it would not be absolutely bound. The verdict would have been reviewable on a motion for a new trial. *Peo. ex rel. Kruse v. Woodman*, 23 St. Rep. 89, 4 Supp. 555, affirmed, without opinion, 123 N. Y. 634.

It should be noted that this decision was given in a case arising under Laws 1886, chap. 496, providing for a review of the action of a board of excise by mandamus, providing that in effect the court or judge shall determine the issues upon the trial. See *Peo. ex rel. Kunse v. Woodman*, on the first appeal, 16 St. Rep. 717, 1 Supp. 335. On this first appeal it was held that the submission of issues of fact to the jury was only to assist the court in ascertaining the facts in controversy, and did not preclude the court from making a determination on the whole record, for the act under which the proceeding was maintained, Laws 1886, chap.

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496, provided in effect, that the court shall determine the issues on the hearing. *Peo. ex rel. Kunse v. Woodman*, 16 St. Rep. 717, 1 Supp. 335. In connection with §§ 2082, 2083, providing for a trial of issues on the alternative writ, see also §§ 2084, 2085, as to the proper place of trial.

Section 792, Code Civil Procedure, gives a preference to the writ of mandamus in certain cases, over any of the causes specified in § 791. The provision is as follows :

§ 792. [Am'd, 1895.] Preference in mandamus or prohibition.

Where a writ of mandamus or of prohibition has been issued from the appellate division of the Supreme Court, to a Special Term, or a judge of the same court, the cause may, in the discretion of the court, or, where an appeal is taken therein to the Court of Appeals, in the discretion of that court be preferred over any of the causes specified in the last section.

L. 1895, ch. 946.

See, under this section, *Peo. ex rel. v. Myers*, 50 Hun, 482.

Compare, also, *Peo. ex rel. Davenport v. Rice*, 68 Hun, 26, 52 St. Rep. 51, 22 Supp. 632, where the court, in construing §§ 2068, 2084, upon an application for a peremptory writ, said, without passing upon the point however, that when the material facts occurred some in the first judicial district and some in the third judicial district, that the Special Term in the first district had under the sections jurisdiction to entertain the application. The inference seems to be that under the circumstances an alternative writ would be triable in the proper county of either department under § 2084.

Where the alternative writ is issued and the facts developed on trial, the order may award such final writ as the facts warrant. This on the ground that the proceedings are made analogous to those in an action, and the judgment may therefore be consistent with the facts proven. *People ex rel. Broderick v. Morton*, 24 App. Div. 567. But as to damages the Court of Appeals says: "It is true that the sections of the Code (§§ 2082, 2088) contemplate the issuing of an alternative writ of mandamus and due proceedings thereunder which result in the order for the peremptory writ, but it would be a narrow and unreasonable construction of these provisions to hold that the order granting the peremptory writ, after a litigation in the nature of an action under § 2082, carries with it greater advantages or rights, than a similar order entered upon motion. *Peo-*

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ple ex rel. Goring v. Wappingers Falls, 151 N. Y. 389. See the opinion in the Supreme Court on an application for assessment of damages after the opinion in the above proceeding. *People ex rel. Goring v. Wappingers Falls*, 20 Misc. 27.

Order for Peremptory Writ Following Alternative Writ Issued in First Instance.

At a Special Term of the Supreme Court held at the court-house in the city of Brooklyn, on the 26th day of April, 1887 :

Present :—Hon. Charles F. Brown, *Justice*.

People *ex rel.* Thomas R. Deverell,

agst.

The Musical Mutual Protective Union.

} 118 N. Y. 101.

The relator herein having, on the 7th day of August, 1885, procured an alternative writ of mandamus requiring the respondent to restore him to his rights and privileges as a member of said respondent corporation, and said writ having been duly served, and the respondent having made a return to said writ, and the issues raised by said writ, and the said return having come on to be tried at a circuit of this court for the county of Kings, on the 25th day of March, 1886, and it having been agreed by the parties that the issue should be taken from the jury and decided by the court, and due deliberation having been had, and the court having duly made and filed its findings of fact and conclusions of law, on motion of Eugene Fisher, attorney for the relator,

It is now hereby ordered, adjudged, and decreed, that a writ of peremptory mandamus do forthwith issue out of this court commanding the said respondent, The Musical Mutual Protective Union, to restore the relator, Thomas Deverell, to his rights and privileges as a member of said Union.

It is further ordered, adjudged, and decreed, that the relator, Thomas R. Deverell, recover from the respondent, The Musical Mutual Protective Union, the sum of \$400 damages and \$50 costs and disbursements, amounting in the aggregate to the sum of \$450, and that he have execution therefor.

SUB. 4. PRECEDENTS FOR PROCEEDINGS ON ALTERNATIVE WRIT.

The following precedents are given for proceedings on writ of alternative mandamus, from a case arising as to legislative printing, and are here grouped for convenience instead of being given under separate sections. They give the proceedings where a peremptory writ is asked for and an alternative writ awarded and trial had.

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Petition for Writ.

To the Supreme Court of the State of New York :

The petition of the Argus Company respectfully shows :

I. That it is a corporation duly organized, and existing under and by virtue of the laws of this State.

II. That heretofore, and at least twenty days previous to the 15th day of December, 1885, the comptroller and secretary of State caused to be published, as provided for in § 1 of chapter 215 of the Laws of 1881, a notice that sealed proposals would be received for doing the public or legislative printing for two years, from January 1, 1886.

That during the time when such publication was made, and down to and including December 31, 1885, Joseph B. Carr was such secretary of State, and Alfred C. Chapin was comptroller of the State of New York.

That said secretary and comptroller duly met at the time appointed and opened the bids received pursuant to said notice, and said public officers could not agree upon the person or corporation to whom the award for such printing should be made.

That on the 31st day of December, 1885, the said secretary and comptroller could not come to an agreement, and on said date the terms of office of said secretary and comptroller expired. That on the 1st day of January, 1886, Frederick Cook was the duly qualified secretary of State and the successor of said Carr as such secretary, and Alfred C. Chapin, the duly qualified comptroller of said State and his own successor in said office. That on said 1st day of January, 1886, the said secretary of State and said comptroller met and considered such bids, and awarded and executed the contract for doing the public and legislative printing for the term of two years, from January, 1886, to the relator.

A copy of said contract, which was duly executed by the relator, is hereto annexed and marked "A," and forms a part hereof.

III. That by the statutes of this State, especially chapters 215 and 621 of the Laws of 1881, it is among other things therein provided that it should be the duty of the person to whom the contract to do the public or legislative printing should be awarded to print seven hundred and nineteen copies of the journals of each house, as the same shall from time to time be delivered to him by the clerks of the senate and assembly respectively.

Also to print seven hundred and nineteen copies of the messages from the governor, reports of standing or select committees, and reports and communications made in pursuance of laws, or of a resolution of either house, which matters are generally known as "documents," whenever ordered by the house to which such message, report, or communication shall be made. Also to print for the use of the members of the legislature during its session, six hundred and forty copies of every bill, the printing of which shall be ordered by either house. And it was further provided, that the said bills and journals should be printed and distributed by the said printer within forty-eight hours after the same were placed in his hands.

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That Charles A. Chickering is the clerk of the assembly of this State, and has the custody, control, and possession of the bills introduced in the assembly and ordered printed, and is the keeper and custodian of the journal of the assembly; that since the making of the said contract with the petitioner the said clerk has kept and has in his possession the journal of the assembly of this State, and various bills introduced into that body ordered to be printed, and numerous messages, reports, and documents duly ordered to be printed; that the petitioner is advised by his counsel that it is the duty of said clerk to deliver the said journal and the said bills and documents to the petitioner to be printed under its contract, and that it is a matter of public concern that such matter be promptly printed under the contract and by the petitioner.

IV. That said Charles A. Chickering has been heretofore duly requested by your petitioner to deliver and convey to it the journals, bills, and "documents" of said body, and the materials and "copy" thereof and therefor, for the printing of the same in accordance with said contract, but he has refused and neglected so to do, and still neglects and refuses to do so, in neglect and violation of his duty.

Wherefore, your petitioner asks that a peremptory writ of mandamus may issue out of this court, directed to said Charles A. Chickering, clerk of the assembly of this State, and his assistants and subordinates, to deliver, or cause to be delivered to your petitioner, the journals, bills, and documents of said body, and the material and "copy" thereof and therefor, for the printing and delivery of the same in accordance with the provisions of said contract.

THE ARGUS COMPANY,

Dated Albany, Feb'y 17, 1886. Per W. H. JOHNSON, *Manager*.
(Add verification as to complaint.)

Order to Show Cause.

SUPREME COURT.

In the Matter of the Application of the Argus Company for a Writ of Mandamus.
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On the foregoing papers let Charles A. Chickering, clerk of the assembly of the State of New York, show cause at a Special Term of the Supreme Court to be held at the chambers of Mr. Justice Ingalls, in the city of Troy, on the first Monday of February, 1886, why a writ of peremptory mandamus should not issue out of this court, directing him and his assistants and subordinates, and all, each and every person who acts in that capacity, to deliver to the Argus Company, the petitioner herein, the bills, journals, and documents of the assembly of this State, and the material and "copy" thereof and therefor for the printing of the same, in accordance with the requirements of the law, or for such other and further order in the matter as to the court may seem proper.

Service of this order less than eight days, and on or before the 29th day of January, 1887, to be sufficient.

Albany, Jan'y 28, 1886.

R. W. PECKHAM.

Justice Supreme Court.

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Affidavit to Oppose Application for Peremptory Writ.

SUPREME COURT.

In the Matter of the Application of the Argus Company for a Writ of Mandamus.	}
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CITY AND COUNTY OF ALBANY, ss. :

John D. Parsons, of said city and county, being duly sworn, says that he denies that a copy of the contract annexed to the petition herein was duly or legally executed or signed by the Hon. A. C. Chapin, comptroller, or Frederick Cook, secretary of State, or by said Argus Company, or that the same is a legal or valid contract.

Deponent further alleges and states that the comptroller signed and executed said contract December 31, 1885; that the secretary of State did not become such or sign said contract until January 1, 1886; deponent further denies that after said secretary of State became such, the secretary of State and comptroller met and considered the said contract, or the propriety of making the same, or the facts relative to the propriety of making the same, as they were required by law to do, and alleges that they did not meet and consider said contract or the propriety of making the same, or the facts relative thereto or affecting the same.

That these denials and allegations are made upon information and belief, and upon statements and evidence under oath, by said comptroller and secretary of State as witnesses before joint committees of the senate and assembly.

That the firm of Weed, Parsons & Co. duly made and delivered to the secretary of State and comptroller, on or about the 15th day of December, 1885, sealed proposals for the printing provided to be done under the said law of 1881, for two years, commencing on the first day of January thereafter, in accordance with the said law and the advertisement for proposals; that the amount of their said bid and proposals is correctly stated in schedule "A," and under and following their name, which bid and proposal of said firm was the lowest offer or bid to do such printing of any of the offers or bids delivered to or received by the said secretary of State and comptroller therefor. That said Weed, Parsons & Co. gave security in a bond to the people of the State of New York, to the satisfaction of the secretary of State and comptroller, for the faithful performance of the contract for such printing.

(Jurat.)

(Signature.)

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Order for Alternative Writ of Mandamus.

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 23d day of February, 1886 :

Present:—Hon. William L. Learned, *Justice*.

In the Matter of the Application of the Argus
Company for a Writ of Mandamus,

agst.

Charles A. Chickering, as Clerk of the Assembly
of the State of New York.

On reading and filing the petition, order to show cause, orders of adjournment to this term, and amended petition on the part of the petitioner, and the affidavits of John W. Vrooman and Charles A. Chickering and John D. Parsons, and after hearing Samuel Hand and S. W. Rosendale, for the petitioner; Hamilton Harris and N. C. Moak, for the defendants, opposed; it is

Ordered, that an alternative mandamus issue out of and under the seal of this court, directed to said defendant, commanding him and his assistants and subordinates to deliver, or cause to be delivered, to the Argus Company, the relator, the journals, bills, and documents of the assembly and senate respectively, and the material or "copy" thereof and therefor, for the printing and delivering of the same in accordance with the provisions of the contract in the petition referred to.

Enter in Albany County.

W. L. LEARNED,

Justice Supreme Court.

Alternative Writ.

The People of the State of New York, on the relation of the Argus Company, to CHARLES A. CHICKERING, Clerk of the Assembly of the State of New York, greeting :

WHEREAS, As is alleged by the Argus Company of the city of Albany (here insert substantially and in form, as in a pleading, the allegations of the petition, by which the proceeding was commenced); and

WHEREAS, An order was made by this court, on the 28th day of January, 1886, commanding you to show cause why a writ of peremptory mandamus should not issue out of this court, directing you to comply with the prayer of the petition made by said Argus Company (recite prayer); and

WHEREAS, On the 23d day of February, 1886, you filed affidavits in this court denying some of the material facts set out in such petition, and an order was, therefore, made, directing that an alternative writ of mandamus issue as therein set forth at length :

Now, therefore, we being willing that full and speedy justice be done in this behalf to it, the Argus Company, do, therefore, command you, that immediately after the receipt of this writ, you, your assistants, and subordinates deliver, or cause to be delivered, to the Argus Company, the relator, the journals, bills, and documents of the assembly, and the

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matter or "copy" thereof and therefor, for the printing and delivery of the same, in accordance with the provisions of the contract in the petition referred to; or that you show cause why the command of the writ ought not to be obeyed, and that you make return of this writ, pursuant to § 2072 of the Code of Civil Procedure, within twenty days after service hereof upon you, lest complaint shall again come to us by your default.

Witness, Hon. William L. Learned, justice of the Supreme
[L. s.] Court, at the court-house in the city of Albany, on the 23d
day of February, 1886.

ROSENDALE & HESSBERG,

ROBERT H. MOORE,
Clerk.

Attorneys for Petitioner.

Indorsed:—"By order of the court. ROBERT H. MOORE,
" Clerk."

Return to Alternative Writ of Mandamus.

The People of the State of New York *ex rel.*
the Argus Company

agst.

Charles A. Chickering, as Clerk of the As-
sembly of the State of New York.

Charles A. Chickering, clerk of the assembly of the State of New York, returns and answers to the alternative writ of mandamus, a copy of which is hereto annexed, that (here insert facts set out in affidavits in answer to application for peremptory writ).

Wherefore, this defendant asks that the prayer of the petitioner, as set forth in the alternative writ, be denied and the proceedings dismissed.

CHARLES A. CHICKERING.

HARRIS & RUDD,

Defendant's Attorneys.

Decision on Trial.

At a term of the Circuit Court of, in, and for the county of Albany, held
at the city of Albany, on the 16th day of December, 1886:

Present:—Hon. Charles R. Ingalls, *Justice.*

The People of the State of New York, on the
relation of the Argus Company,

agst.

Charles A. Chickering, as Clerk of the As-
sembly of the State of New York.

The above-entitled proceeding having been reached in its order on the

 Art. 5. Alternative Writ and Proceedings Thereon.

calendar, and a jury trial having been waived by the parties, Messrs. Rosendale & Hessberg, and E. Countryman, Esq., appearing for the relators, and Hamilton Harris and N. C. Moak, Esq., appearing for the defendants, the relator having presented and rested his case, and the defendant having rested his case, and the facts being all presented to the court, and the proceedings having been tried and submitted, I do find and decide as follows:

FACTS.

I. That the allegations in the alternative writ of mandamus are correct and true, and the facts are herein correctly set forth.

II. That the legislative printing for 1886 was done by Weed, Parsons & Co., under and pursuant to the resolutions respectively of the senate and assembly, pending the determination of the questions involved in these proceedings. The said Weed, Parsons & Co. claimed to have a contract for legislative printing signed by Joseph B. Carr, secretary of State, on December 31, 1885, which paper was introduced and read in evidence, signed by said Carr.

III. That provisions are now made by law for future legislative printing, after the expiration of the present contract, different from that under which the contract in question was made.

CONCLUSIONS OF LAW.

That plaintiff, relator in the above-entitled proceeding, is entitled to, and that a peremptory writ of mandamus forthwith issue in the above-entitled proceeding to the defendant and his successors in office, requiring and commanding them to deliver for and during the year 1887, to the Argus Company, under and pursuant to the contract referred to in the alternative writ herein, with said Argus Company, all matter and copy for the printing to be done under said contract and pursuant to law.

CHARLES R. INGALLS,

Justice Supreme Court.

Final Order for Peremptory Mandamus.

At a Special Term of the Supreme Court, held in and for the county of Albany, on the 16th day of December, 1886:

Present:—Hon. Charles R. Ingalls, *Justice*.

The People of the State of New York, on the relation of the Argus Company,	}
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agst.

Charles A. Chickering, as Clerk of the Assem- bly of the State of New York.	}
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The above-entitled proceeding having been reached in its order on the calendar, at a Circuit Court held this day, in and for the county of

 Art. 6. Defences to Mandamus.

Albany, and a jury trial having been waived by the parties, Messrs. Rosendale & Hessberg and E. Countryman, Esq., appearing for the relator, and Hamilton Harris and N. C. Moak, Esq., appearing for the defendants, the relator having presented and rested his case, and the defendant having presented his case, and the facts having been all presented to the court, and the decision of Hon. C. R. Ingalls, justice presiding at said court, and who tried said proceedings, being now duly presented and filed, whereby he finds that relator is entitled to a peremptory mandamus; and it appearing that the legislative printing for 1886 was done by Weed, Parsons & Co., under and pursuant to the resolutions, respectively, of the senate and assembly, pending the determination of the questions involved in these proceedings, and provision being now made by law for future legislative printing after the expiration of the present contract, different from that under which the contract in question was made: It is on motion of Rosendale & Hessberg, attorneys for said relator, Messrs. Harris and Moak, aforesaid, appearing for defendants;

Ordered that a peremptory writ of mandamus forthwith issue in the above-entitled proceeding to the above defendant and his successors in office respectively, requiring and commanding them to deliver, for and during the year 1887, to the Argus Company, under and pursuant to the contract referred to in the alternative writ herein with said Argus Company, all matter and copy for the printing to be done by said company under said contract, and pursuant to law.

Enter.

C. R. INGALLS,

Justice Supreme Court.

ARTICLE VI.

DEFENCES TO MANDAMUS.

Objections to the granting of a peremptory writ may be made on argument and after an alternative writ has been served upon the respondent; he must either demur thereto under § 2076 of the Code, or make his return showing either that the act has been performed pursuant to the requirements of the alternative writ, or setting forth facts which constitute a defence.

The following are some of the principal lines of defences in mandamus to be taken by objection on argument for peremptory writ, or by demurrer, when the defence is apparent upon the face of the alternative writ, or that may be raised as questions of fact by the return. It is not attempted to collate all the defences which have been upheld by the courts of this State, but only to indicate the general lines of such defence, and to indicate the principles which may be applied by a practitioner to the case in hand.

Art. 6. Defences to Mandamus.

Mandamus may be defended on the following grounds :

That it is issued to a person, officer, or board to control a discretion conferred by law upon them. *Hull v. Supervisors of Oneida*, 19 Johns. 259; *People v. School Officers*, 18 Abb. Pr. 165; *Ex parte Benson*, 7 Cow. 353; *Ex parte Coster*, 7 Cowen, 523; *People v. Judges of Chatauqua*, 1 Wend. 73; *People v. Superior Court*, 19 Wend. 701; *People ex rel. Harris v. Commissioners*, 149 N. Y. 30; *People ex rel. Wooster v. Maher*, 141 N. Y. 336; *People v. Supervisors of Greene County*, 12 Barb. 217; *People v. Canal Board*, 13 Barb. 432; *People v. Board of Education*, 5 Supp. 393; *People ex rel. Bullard v. The Contracting Board*, 33 N. Y. 383; *In re Town Board of Lloyd*, 7 Supp. 165; *People ex rel. Millard v. Chapin*, 104 N. Y. 100; *People ex rel. Brown v. Board of Apportionment*, 52 N. Y. 227; *People ex rel. Woodward v. Rosendale*, 76 Hun, 106; see *Matter of Hilton Bridge Company*, 13 App. Div. 29. That it commands the doing of an illegal act. *People ex rel. Supervisors v. Fowler*, 55 N. Y. 254; *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 369, 370; *People ex rel. Pond v. Supervisors*, 47 St. Rep. 456, 19 Supp. 978, reversing on other grounds 47 St. Rep. 702; *Matter of Popoff*, 10 Misc. 273, 63 St. Rep. 438, 31 Supp. 2. That the act is already performed. *Deane v. Greene County Supervisors*, 66 How. Pr. 461. That the facts are of such a character as to show a want of jurisdiction. *People v. Commissioners*, 27 Barb. 94; *Matter of Popoff*, 10 Misc. 273, 63 St. Rep. 438, 31 Supp. 2; *People ex rel. Dady v. Supervisors*, 89 Hun, 244, 69 St. Rep. 448, 35 Supp. 91; s. c. 6 App. Div. 228. That the remedy would be ineffectual. *Ex parte Paine*, 1 Hill, 667; *People v. Supervisors*, 15 Barb. 607; *People ex rel. Stevens v. Hayt*, 66 N. Y. 608; see, also, *People ex rel. Krohn v. Miller*, 39 Hun, 564; *Colonie Life Ins. Co. v. Supervisors of New York*, 24 Barb. 166; *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 369, 370; compare *People ex rel. Linnickin v. Ennis*, 18 App. Div. 413. That the act sought to be coerced is impossible. *Silverthron v. Warren R. Co.*, 33 N. J. Law, 173; *People v. Chicago R. Company*, 55 Ill. 95; see, also, *People ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 152; and *People ex rel. Wingard v. Kromer*, 5 Misc. 54, 25 Supp. 48, affirmed, 28 Supp. 1039, 78 Hun, 58; *People ex rel. Hoffman v. Tedcastle*, 12 Misc. 468, 68 St. Rep. 135, 34 Supp. 257. That the act is prohibited by injunction. *People v. Village of West Troy*, 25 Hun, 182; *People ex rel. Humphrey v. Supervisors*,

 Art. 6. Defences to Mandamus.

30 Hun, 147; *St. Stephen's Church Cases*, 25 Abb. N. C. 244, 11 Supp. 669. But see *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166. That the constitutionality of an act of the legislature is involved. *People v. Stevens*, 2 Abb. Pr. N. S. 348; *Matter of Woods*, 5 Misc. 575; compare *People ex rel. Burbank v. Robinson*, 14 Hun, 226; *People ex rel. Canal Board*, 4 Lans. 275. That it is sought to try the title to a public office. *People v. Stevens*, 5 Hill, 616; *Matter of Torney*, 7 Misc. 260; *People ex rel. Rumph v. Supervisors*, 89 Hun, 40; *People ex rel. Hoffman v. Rupp*, 90 Hun, 148; *People ex rel. Wren v. Goetting*, 133 N. Y. 569; *Matter of Gardner*, 68 N. Y. 467; but compare *People ex rel. Drake v. Sutton*, 88 Hun, 174. That it seeks to restrain an anticipated act. *People ex rel. Sayles v. Fitzgerald*, 37 St. Rep. 540, 13 Supp. 663, affirmed, 128 N. Y. 620; *People ex rel. Smith v. Richmond*, 5 Misc. 26, 25 Supp. 144; High on Extraordinary Remedies, 14; *Brown v. Duane*, 60 Hun, 98, 37 St. Rep. 691, 14 Supp. 540. That it seeks to enforce a mere contract. *People ex rel. Morrell v. Worth*, 16 Misc. 664, 72 St. Rep. 733, 37 Supp. 126; *People ex rel. Ryan v. Aldridge*, 83 Hun, 280, 31 Supp. 920; *People v. Board of Education*, 60 Hun, 488-584; *People ex rel. Bullard v. Contracting Board*, 33 N. Y. 382; but see *People ex rel. Cronin v. Coffey*, 62 Hun, 86, affirmed, 131 N. Y. 569; *People ex rel. Weed-Parsons Co. v. Palmer*, 14 Misc. 41, 68 St. Rep. 166, 35 Supp. 222; compare *Matter of Finnigan*, 91 Hun, 176, 71 St. Rep. 133, 36 Supp. 331. That the respondent is not bound to do the act. *People ex rel. Gaige v. Reardon*, 49 Hun, 425. That there is a remedy by appeal. *Ex parte Koon*, 1 Denio, 645; *People ex rel. Wright v. Coffin*, 7 Hun, 609; *People ex rel. Gottchius v. McGoldrick*, 67 St. Rep. 289, 33 Supp. 441, 24 Civ. Pro. 292; compare *People ex rel. Stevens v. Lott*, 42 Hun, 409; but see *People ex rel. Fraser v. Trustees of Hamden*, 71 Hun, 464. That there was no refusal by the respondent to do the act sought to be coerced. *In re Whitney*, 3 Supp. 839; *Fish v. Weatherwax*, 2 Johns. Cases, 217, note, § 15; but see *People ex rel. Welling v. Mcakim*, 56 Hun, 632, 24 Abb. N. C. 477, affirmed, 123 N. Y. 660; compare *People ex rel. O'Brien v. Cruger*, 12 App. Div. 538. That where the act is to be performed by either of two persons there has not been a refusal on the part of both. *R. v. Bishop of London*, 13 East, 419. That defendant has no power to perform the act. *People ex rel. Stevens v. Hayt*, 66 N. Y. 606;

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People ex rel. McKone v. Green, 11 Hun, 60. That there was no proper tender on the part of the relator where tender is required. *Matter of McGrath*, 56 Hun, 78, 29 St. Rep. 704. That the claim, the payment of which is required, has not been audited. *People v. Brennan*, 18 Abb. Prac. 100. Or, though audited, that the claim has been wrongfully allowed. *People ex rel. Merritt v. Lawrence*, 6 Hill, 245; see, also, *People ex rel. McShedon v. Stout*, 23 Barb. 349. That the public officer sought to be coerced has no money with which to perform the act. *People v. Edmonds*, 19 Barb. 472; *People v. Hawes*, 36 Barb. 59; *People ex rel. Robinson v. O'Keefe*, 100 N. Y. 576; *People ex rel. Burbank v. Robinson*, 76 N. Y. 424; but see *People ex rel. Dannant v. Comptroller*, 77 N. Y. 45; *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38. But a lack of funds is no defence where an audit and not a payment of account is required. *People v. Supervisors*, 22 How. Prac. 71. That a payment sought to be coerced has already been made to another party. *Matter of Grady*, 15 App. Div. 506. That there was laches on the part of the respondent. *Ex parte Koon*, 1 Denio, 645; *People v. Seneca Common Pleas*, 2 Wend. 264; *People ex rel. Miller v. Justices of Sessions*, 78 Hun, 334, 29 Supp. 157; *People ex rel. Milliard v. Chapin*, 104 N. Y. 102; *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 Supp. 698; *Matter of Vanderhoff*, 15 Misc. 434, 72 St. Rep. 354, 36 Supp. 833; *People ex rel. Vanderhoff v. Palmer*, 3 App. Div. 389; *People ex rel. Jordan v. Board of Education*, 69 St. Rep. 622. Compare *People ex rel. Gas Light Company v. Common Council of Syracuse*, 78 N. Y. 61, Laws of 1896, chapter 909, § 133. That the action is barred by the Statute of Limitations, and the delay is not explained. *People ex rel. Milliard v. Chapin*, 104 N. Y. 102; *People ex rel. Byrne v. French*, 12 Abb. N. C. 156, Code Civil Procedure, § 414; *People ex rel. Best v. Preston*, 62 Hun, 189, 41 St. Rep. 214, affirmed, 131 N. Y. 644; *People ex rel. Sheridan v. French*, 31 Hun, 617, 13 Abb. N. C. 413. That there is another remedy. *People v. Stevens*, 5 Hill, 616; *People ex rel. Milliard v. Chapin*, 104 N. Y. 102; *People ex rel. Moulton v. Mayor*, 10 Wend. 397; *People ex rel. Wright v. Coffin*, 7 Hun, 609; *People ex rel. Bank v. Board of Apportionment*, 64 N. Y. 629; *Ex parte Lynch*, 2 Hill, 46; *People ex rel. Gottchius v. McGoldrick*, 67 St. Rep. 289, 33 Supp. 441; *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; *Clark v. Miller*, 54 N. Y. 528; *People ex rel. McKone v.*

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Green, 11 Hun, 61; *People ex rel. Perkins v. Hawkins*, 46 N. Y. 11; *People ex rel. Huntington v. Crennan*, 141 N. Y. 239, 56 St. Rep. 807. But see the limitations to this defence in *People ex rel. Weed-Parsons Co. v. Palmer*, 14 Misc. 41, 68 St. Rep. 166, 35 Supp. 222; *People ex rel. Pennell v. Treanor*, 15 App. Div. 511; *People ex rel. Livingston v. Taylor*, 1 Abb. Prac. N. S. 200; *Buck v. City of Lockport*, 6 Lansing, 255; *People ex rel. Fielder v. Mead*, 24 N. Y. 120; *McCullough v. Mayor of Brooklyn*, 23 Wend. 458. That no notice has been given in a case requiring notice. *People ex rel. Hasbrouck v. Board of Canvassers*, 18 Supp. 303, 45 St. Rep. 614. Unless the error is waived by making a return without objection; s. c. 135 N. Y. 532, 48 St. Rep. 536. That the relator has no authority to maintain the proceedings. *St. Stephen's Church Cases*, 25 Abb. N. C. 247, 11 Supp. 669; *People v. Blackhurst*, 60 Hun, 64, 15 Supp. 114. That the right of the relator is not clear. *People v. Village of West Troy*, 25 Hun, 182; *Matter of Gardner*, 68 N. Y. 467; *Matter of Hilton Bridge Company*, 13 App. Div. 29; *Matter of Finnigan*, 91 Hun, 176, 71 St. Rep. 133, 36 Supp. 331; *People ex rel. Frost v. Fay*, 3 Lans. 398; *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; *People ex rel. Jordan v. Board of Education*, 69 St. Rep. 622. That, in view of the facts, the court should refuse the writ as a matter of discretion. *Fish v. Weatherwax*, 2 Johnson's Cases, 217, note, § 17; *People ex rel. McKone v. Green*, 11 Hun, 61; *St. Stephen's Church Cases*, 25 Abb. N. C. 246; *Van Rensselaer v. Sheriff*, 1 Cowen, 512; *People ex rel. Faile v. Ferris*, 76 N. Y. 329; *People ex rel. Wood v. Assessors*, 137 N. Y. 201, 50 St. Rep. 404; *People ex rel. Lunney v. Campbell*, 72 N. Y. 498; *Matter of Sage*, 70 N. Y. 223; *People ex rel. Fiske v. Devermann*, 83 Hun, 183, 64 St. Rep. 147, 31 Supp. 593; but compare *People ex rel. Gas Light Company v. Common Council of Syracuse*, 78 N. Y. 61. That the relator has not exhausted his remedy by statute, where there is one. *People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun, 130, 33 Supp. 244; *People ex rel. Huntington v. Crennan*, 141 N. Y. 239, 56 St. Rep. 807. That the relator has not performed a condition precedent. *People ex rel. Stevens v. Hayt*, 66 N. Y. 606; *Matter of McGrath*, 56 Hun, 78, 29 St. Rep. 704; *People ex rel. O'Brien v. Cruger*, 12 App. Div. 538. That the claim involved is fraudulent. *People ex rel. Slavin v. Wendell*, 71 N. Y. 172. That it is sought to relieve the relator from the consequences of his own fraud. *Peo-*

 Art. 7. Stay of Proceedings ; Damages and Fines.

ple ex rel. Wood v. Assessors, 137 N. Y. 204. That relator has accepted performance by third parties. *People ex rel. P. C. Savings Bank v. Cromwell*, 102 N. Y. 477. That the relator is estopped. *People ex rel. Bliss v. Board of Supervisors*, 15 Supp. 748.

ARTICLE VII.

 STAY OF PROCEEDINGS ; DAMAGES AND FINES. §§ 2089, 2088,
2090.

§ 2089. [Am'd, 1895.] Stay to proceedings ; enlargement of time.

The proceedings upon a writ of mandamus, granted at a Special Term, may be stayed and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by a judge of the court, but not by any other officer. Where the writ was granted at a term of the appellate division, an order staying the proceedings, or enlarging the time to make a return, can be made only by a justice of the appellate division of the same department ; and where notice has been given of an application for a mandamus at a term of the appellate division of the Supreme Court, or an order has been made to show cause, at such term, why a mandamus should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

§ 2088. When relator to recover damages.

Where a return has been made to an alternative writ of mandamus, issued upon the relation of a private person, the court, upon making a final order for a peremptory mandamus, must also, if the relator so elects, award to the relator, against the defendant who made the return, the same damages, if any, which the relator might recover in an action against that defendant, for a false return. The relator may require his damages to be assessed upon the trial of an issue of fact, if the verdict, report, or decision is in his favor. Where he is entitled to a final order, for any other cause, he may require them to be assessed as in an action. Such an assessment of damages bars an action for a false return.

§ 2090. Fine in certain cases.

Where a final order awards a peremptory mandamus, directed to a public officer, board, or other body, commanding him or them to perform a public duty, enjoined upon him or them by a special provision of law, if it appears to the court, that the officer, or one or more members of the board or body, have, without just excuse, refused or neglected to perform the duty so enjoined, the court, besides awarding to the relator his damages and costs, as prescribed in this article, may, in the same order, impose a fine, not exceeding two hundred and fifty dollars, upon the officer, or upon each member of the board, who has so refused or neglected. The fine, when collected, must be paid into the treasury of the State ; and the payment thereof bars any action for a penalty, incurred by the person so fined, by reason of his refusal or neglect to perform the duty so enjoined.

The application for a stay at Special Term may be made on argument, and the stay embodied in the writ ; or, the better practice is to enter an order staying proceedings on the writ pending

 Art. 7. Stay of Proceedings ; Damages and Fines.

an appeal; or, in case the application is not made until after order entered, it may be made upon an affidavit setting out the facts, and that an appeal has been or is about to be taken. No notice of the application is necessary, unless required by the court to which the application is made.

**Precedent for Order Staying Proceedings, Pending Appeal,
Made on the Argument.**

At a Special Term of the Supreme Court, held at City Hall in Albany,
on the 20th day of December, 1885 :

Present :—Hon. R. W. Peckham, *Justice*.

SUPREME COURT.

The People of the State of New York,

agst.

The Board of Supervisors of the County of
Ulster.

An application having been this day made for a writ of mandamus directing the board of supervisors of the county of Ulster to levy and assess on the taxable property of said county the sum of \$28,098, and the same having been granted by order of the court, after hearing I. H. Maynard, deputy attorney-general, for the motion, and J. Newton Fiero, opposed, and it appearing that the defendant is about taking an appeal from said order, on motion of defendant's counsel, it is ordered that all proceedings on said writ be stayed until the expiration of the time to appeal from said order, and in case such appeal is taken, then that all proceedings thereon be stayed till the hearing and determination of said appeal.

Enter in Ulster County.

R. W. PECKHAM.

The writ of mandamus is an order of the court within the meaning of the statute, providing for punishment as for a contempt for disobedience of any lawful order of a court of record, and the fine imposed in such a case may include a reasonable compensation for relator's attorney.

The provisions of the Revised Statutes that when a peremptory writ is directed to a public officer or board, requiring them to perform a public duty, and it shall appear they have neglected so to do, a fine of \$250 may be imposed, were not intended to prescribe the punishment for disobeying the writ, but to enforce a fine for past neglect, in addition to awarding the writ. But

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the directors of a corporation are not a public officer, body, or board under this statute. *People v. State Line R. R.*, 76 N. Y. 294.

The offence for which the fine is authorized to be imposed is not disobedience of the writ but the unexcused neglect of duty of which the officer was guilty before the writ issued, and which rendered the application necessary, and the fine may be imposed at the time of issuing the peremptory writ. It is entirely independent of punishment as for a contempt in disobeying the writ.

This decision, although made before the Code, seems still to be in point, as the changes made (2 R. S. 587, § 60) by this section are slight and do not seem to affect this question. In *People v. Supervisors of Delaware*, 45 N. Y. 196, a second writ was served where first writ had not been fully obeyed. The court will stay the issuance of a peremptory writ of mandamus to compel the comptroller of a city to pay an award made by commissioners under L. 1893, ch. 537, where proceedings by *certiorari* had been issued to review the correctness of said award. *Peo. ex rel. Purdy v. Fitch*, 147 N. Y. 362, reversing 87 Hun, 304, 68 St. Rep. 320. Where a mandamus has been granted, and the questions decided in granting the same are important and fairly debatable, proceedings under the writ will be stayed until the appeal from the order of mandamus is decided by the General Term under § 2089 of the Code Civil Procedure providing for a stay of proceedings under the writ of mandamus. *Peo. ex rel. Fleming v. Hart*, 11 Supp. 674, 25 Abb. N. C. 266. In proceedings by mandamus to compel the board of police commissioners of a city to pay the salary of a police officer, it is error to grant a money judgment against the respondent. *Peo. ex rel. Nugent v. Police Comm.*, 114 N. Y. 245, 23 St. Rep. 230. At common law the issues raised for a return to an alternative writ could not be tried in mandamus proceedings, and thus in such case the relator could not recover damages in the proceeding. His method was to falsify the return in an action for that purpose, in which action he recovered damages. This method being too dilatory, the practice was changed by statute and by the Code; so now an issue of fact raised by return to the alternative writ is triable by the jury, and the relator is entitled to a verdict where he would be entitled thereto in the old action for damages for a false return (§ 2083); and if he so elect he may at the same time recover the damages which he would have re-

 Art. 7. Stay of Proceedings ; Damages and Fines.

covered in such action for a false return (§ 2088). See *Pco. ex rel. Goring v. President*, 13 Misc. 733, 69 St. Rep. 592, reversed on other matters involved, 151 N. Y. 386.

Where one has been expelled illegally from a mutual protective union, damages will be awarded in the final order on the trial of the alternative mandamus for his reinstatement, for the loss suffered in consequence of his expulsion; and where one lost a position as a musician after such expulsion, by reason of his non-membership, it was held to be the proximate result of his expulsion, and as such furnished grounds for the award of damages; held further that the conclusion of the trial court as to the amount of damages was not reviewable in the Court of Appeals. *Pco. ex rel. Deverell v. Musical Mutual Protective Union*, 118 N. Y. 109. Section 2088 of the Code Civil Procedure gives ample authority for allowing the jury to assess the damages sustained by the relator upon the trial of the alternative writ. *Pco. ex rel. Crumney v. Palmer*, 9 App. Div. 60, reversed on other grounds, 152 N. Y. 217.

Section 2088 of the Code of Civil Procedure providing for an award of the relator's damages in proceedings by mandamus applies not only when there is a trial of issues upon the return of the alternative writ, but applies also where the peremptory writ issues in the first instance upon motion. The proper practice is, if the relator wishes to avail himself of this provision, for him to apply for an award of damages at the time he enters the order of the Special Term granting the peremptory writ in the first instance. And if he fails to do so, it is too late to ask for damages on the *remittitur* of the Court of Appeals. It was held, however, that in such case the defendant by entering into a stipulation for the appointment of a referee to take proof to enable the court to assess such damages, waives the failure of the relator to ask for damages at the proper time. *Pco. ex rel. Goring v. Wappinger Falls*, 151 N. Y. 388, reversing 91 Hun, 319, 69 St. Rep. 592, 13 Misc. 734.

Section 2090 of the Code is not a punishment within the meaning of § 117 of the Penal Code, and the awarding of the fine provided by this section of the Code of Civil Procedure does not prohibit a criminal proceeding against the officer for the same act. Public officers neglecting to perform public duties may be proceeded against and punished both under the provisions of the

 Art. 8. Costs, Appeals ; Proceedings for Contempt.

Penal Code and under § 2090 of the Code of Civil Procedure.
People v. Meakim, 133 N. Y. 222, 224.

ARTICLE VIII.

COSTS, APPEALS ; PROCEEDINGS FOR CONTEMPT. §§ 2086, 2087.

SUB. 1. COSTS. § 2086.

2. APPEALS. § 2087.

3. CONTEMPT IN DISOBEYING WRIT.

SUB. 1. COSTS. § 2086.

§ 2086. Costs.

Where an alternative writ of mandamus has been issued, costs may be awarded, as in an action; except that, upon making a final order, the costs are in the discretion of the court. Where a peremptory mandamus is granted, without a previous alternative mandamus, costs, not exceeding fifty dollars and disbursements, may be awarded to either party as upon a motion.

Costs will not ordinarily be given against an officer acting in good faith. *People v. Brinkerhoff*, 68 N. Y. 259. It was held at Special Term, in *People v. Produce Exchange*, 64 How. 523, that under this section only motion costs could be allowed, where a peremptory mandamus is denied without an alternative writ. In *People ex rel. Bray v. Board of Supervisors of Ulster County*, 65 How. 327; and on appeal in same case to General Term, third department, affirmed, 31 Hun, 88, it was held that full costs as of an argument, and not costs of non-enumerated motion, were to be allowed at General Term, and that this section does not apply to costs on appeal. The equity of each case will govern the allowance of costs, and when the order is silent as to costs they will not be allowed. *People v. Densmore*, 1 Barb. 557; *People v. Supervisors of Dutchess*, 3 How. 380. It is not the practice, upon awarding a peremptory writ, to grant costs against judges or other subordinate courts, or other public officers intrusted with the discharge of judicial duties. *Hccox v. Ellis*, 19 Wend. 157. Nor against any public officer, when it appears his refusal to comply with the demand of the relator was conscientious, and founded on reasonable grounds. *People v. Flagg*, 5 Abb. 232. But when judges make a return it has been held otherwise, on the ground that they are then presumed to be indemnified by the party in interest. *People v. Common Pleas*, 18 Wend. 534. It was held in 1874, in *People ex rel. City of Lockport v. Supervisors of Niagara*, 50 How. 353, that costs on final determination on a trial of man-

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damus were to be taxed according to Laws of 1844, chap. 273. As to the present practice, see Code of Procedure, §§ 3240 and 3258, as to double costs. It is not sufficient to render one, not a party to the record, liable for costs, that the return was made at his request, and that he opposed the issuing of the peremptory writ. *People v. Common Pleas*, 2 Wend. 301. But a party resisting a mandamus by requiring the relators to plead or demur, and subsequently joining in demurrer, is liable to costs of the demurrer if relator as judgment. *People v. Common Pleas*, 3 Wend. 304. Costs should follow the denial of a motion for a writ where the defendant opposed, and the law is plain against the relator. *People v. Colburn*, 20 How. 378. A public officer is entitled to double costs where he succeeds upon proceedings. *People v. Colborne*, 20 How. 378. It was held under the former Code that when an alternative writ was awarded and return made and trial had, costs should be taxed according to the fee-bill under the Revised Statutes. This section, of course, determines the practice and conforms the fee-bill to the Code, as in other cases.

Where the court at the time of the decision of the application for mandamus could offer the applicant no relief even if he were legally entitled to the writ, it was held, in modifying the order of denial, that the application should have been dismissed, without costs. *Pco. ex rel. Schwager v. McLachn*, 36 St. Rep. 534, 13 Supp. 384, modifying S. C. 33 St. Rep. 715, 11 Supp. 851. See in connection with this section, § 3258, Code Civ. Pro., which provides that in certain cases the defendant is entitled to increased costs. Among these cases is when special proceedings are instituted by a State writ. The provisions of § 2086 are general, while the provisions of § 3258 are special, and relate only to certain cases in which the defendant is a public officer ; and in such cases the special provisions of § 3258 control the general provisions of § 2086. *Pco. ex rel. v. Speed*, 73 Hun, 302, 57 St. Rep. 295, 26 Supp. 254, affirmed, 142 N. Y. 670.

Where, on an agreed statement of facts, the parties moved directly for a peremptory writ in a case in which, but for such agreement as to facts, an alternative writ would be necessary, it was held that it was to be regarded as a special proceeding and that the costs were discretionary. *Pco. v. N. Y., L. E. & W. R. R. Co.*, 47 Hun, 44. Where the Court of Appeals reverses the decision of the General and Special Terms sustaining a demurrer

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to an alternative writ with costs to the defendant and grants leave to the defendant to answer on payment of costs, the relator may properly apply to the Special Term for an order granting him **the costs** of the Special Term. The granting of such order is discretionary, and the relator is not entitled to such costs as a matter of right under § 2086, Code Civil Procedure, inasmuch as mandamus, though strictly a remedy at law, not in equity, does not fall within the terms of § 3228 of the Code of Civil Procedure. In such cases the General Term costs can only be awarded by the General Term itself. *Peo. ex rel. Keene v. Suprs.*, 33 Hun, 239, 64 St. Rep. 159, affirmed, 145 N. Y. 597.

On a motion by an attorney for a deceased relator in proceedings by mandamus subsequently carried to judgment, by a party substituted for the deceased relator, to make the costs payable to the attorney of the original relator, it was held that such amendment was unauthorized by law ; that the rights of the attorney terminated with the death of the original relator, and that his remedy, if he had a lien, was not by a change in the form of the judgment, but by a hearing in the proceedings before the court, a referee, or jury. *Peo. ex rel. Reynolds v. Common Council*, 9 Misc. 406, 61 St. Rep. 694. In a case where an application for mandamus was held to be premature, as the respondent still **had** time to perform the duty sought to be coerced, costs were not allowed to either party. *Peo. ex rel. Smither v. Richmond*, 5 Misc. 26. The costs allowed and recoverable upon an appeal from an order granting a peremptory writ, when such order is affirmed, are regulated by § 3240, Code Civil Procedure, and, in the discretion of the court, are the same costs which are given on appeal from the judgment. *Peo. v. Ulster County Suprs.*, 65 How. Pr. 327. See, also, *Peo. v. Ewen*, 8 Abb. Pr. 359 ; *Peo. v. Lewis*, 28 How. Pr. 159. When costs are awarded as a matter of discretion they are not subject to review upon appeal. See *Peo. v. Albright*, 23 How. Pr. 306. Section 2088 as to costs apply where a final order for the peremptory writ was obtained in the first instance, without issuing of an Alternative writ, if the relator, at the time of entering his final order, elects to have his damages awarded in a proceeding. *People ex rel. Goring v. Wappingers Falls*, 151 N. Y. 386. See opinion of the court below in assessing damages under the above Court of Appeals' decision. *People ex rel. Goring v. Wappingers Falls*, 20 Misc. 28.

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SUB. 2. APPEALS. § 2087.

§ 2087. [Am'd, 1895.] Appeals.

An appeal from an order granting a peremptory writ of mandamus, where an alternative writ of mandamus was not previously issued, must be taken as from a final order made in a special proceeding. An appeal from a final order made upon an alternative mandamus, must be taken, as an appeal from a judgment ; and each provision of law, relating to an appeal from a judgment, either to the appellate division or to the Court of Appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the appellate division, granting a peremptory mandamus, made upon an original application, or from a final order, made upon an alternative mandamus, granted at the appellate division, the execution of the order appealed from shall not be stayed, except by the order of the same appellate division, made upon such terms, as to security or otherwise, as justice requires.

Where the Special Term denies a peremptory writ of mandamus on the specific ground mentioned in the order that the relator can maintain an action at law on his demand, the General Term, on appeal, is not restricted to that ground, if there is any other proper ground for denial appearing in the papers. *People ex rel. Bagley v. Green*, 1 Hun, 1. Where one of the claimants for property in the sheriff's possession moves for a mandamus against the sheriff to compel him to deliver it, and is opposed by the sheriff with an affidavit of the other claimant, such other claimant cannot appeal, not being a party to the record, even though he was recognized as an appellant at General Term. *People ex rel. Lee v. Lynch*, 54 N. Y. 681. Where the facts give the court jurisdiction, granting or refusing the writ is so far discretionary, that the Court of Appeals will not ordinarily review the exercise of discretion. *In re Sage*, 70 N. Y. 220 ; *People v. Ferris*, 76 id. 326 ; *People v. Campbell*, 72 id. 496. And in such a case no appeal lies, unless the discretion of the General Term has been abused. *In re Dederick*, 77 N. Y. 595 ; *People v. Clyde*, 69 id. 603 ; *People v. Thompson*, 99 id. 641. This rule is not in conflict with the principle asserted in *People ex rel. v. Metropolitan R. R. Co.*, 26 Hun, 82, that judgment adverse to relator not disposed of on mere grounds of discretion, but on the merits, is reviewable by the Court of Appeals. But if a motion for a peremptory writ on answering affidavit is absolutely denied, a subsequent motion to modify the order, so as to permit an alternative writ to issue, is addressed to the discretion of the court, and not reviewable in the Court of Appeals. *People ex rel. Ins. Co. v. Firman*, 91 N. Y. 385. A party who has obtained an extension of time to comply with a mandamus cannot thereafter ap-

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peal. *People v. Rochester R. R.*, 15 Hun, 188. Where the General Term erroneously ordered a peremptory mandamus for payment of the whole of a claim, the Court of Appeals allowed an alternative writ to try the disputed questions. *People v. Schryver*, 69 N. Y. 242. A party on appeal cannot successfully urge that the delay occasioned by his action in appealing will render the writ unavailing if issued. *People v. Contracting Board*, 46 Barb. 254. It is said that when an application is made for a mandamus a respondent may move to vacate former orders granting the writ, though the time to appeal from them has passed. *People v. Cooper*, 24 Hun, 337. On appeal from an order adjudging one guilty of contempt in not obeying the writ, the question as to the propriety of granting the writ cannot be considered. *People v. Rochester R. R. Co.*, 76 N. Y. 294. An appeal to the Court of Appeals from an order of the General Term affirming an order of the Special Term, granting a peremptory writ of mandamus, is taken as from a final order made in a special proceeding, and not as from a judgment. *People ex rel. Collins v. Spicer*, 34 Hun, 584. An appeal lies to the General Term from the order or judgment of the Special Term. *People v. Schoonmaker*, 19 Barb. 657. And from the General Term to the Court of Appeals. *People v. Church*, 20 N. Y. 529; *People v. Supervisors*, 45 id. 196; *People v. Hawkins*, 46 id. 9; *People v. Nostrand*, id. 375; *Becker v. People*, 18 id. 487. This is true in all cases where the decision does not rest solely in discretion whether the writ was granted on application in the first instance for a peremptory writ, or in granting the peremptory writ after an alternative writ has issued. *People v. Sturtevant*, 9 How. 304; *People v. Lewis*, 28 id. 159, 170. This is a change from the practice previous to the Code. This view is in accordance with the practice as established in the Court of Appeals, that the argument on appeal in mandamus cases must be heard as on an appeal from an order, and the appeal does not take its place on the regular calendar, but on the motion calendar, with appeals from orders, and the time given for argument is the same as on appeals from orders. But an appeal to the Court of Appeals from an order of General Term, reversing a judgment of Special Term granting a new trial on alternative writ, after trial of issues of fact, is not an appeal from an order, and should not be brought on as a motion, but should be placed on the general

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calendar. *People v. Laidlaw*, 102 N. Y. 588. The granting of an alternative writ is so much a matter of discretion, that it is not the subject of review on appeal. *Peo. ex rel. Fisk v. Devermann*, 83 Hun, 183, 64 St. Rep. 147, 31 Supp. 593. The Court of Appeals will not review the correctness of an award of damages made by street commissioners though upholding the writ of mandamus to compel the comptroller of the city to pay such award. Such award should be reviewed by *certiorari*, and the court will stay the proceedings by mandamus till such review is had. *Peo. ex rel. Purdy v. Fitch*, 147 N. Y. 362, reversing, 87 Hun, 304, 68 St. Rep. 320.

On reference to § 2087 it will be seen that a distinction is made between proceedings where an alternative writ is first issued, and then a peremptory writ, and those in which a peremptory writ is issued in the first instance. In the latter case that section provides that an appeal is to be taken as from a final order made in a special proceeding. In the former case it is to be taken as an appeal from a judgment. *People ex rel. Collins v. Spicer*, 34 Hun, 584. An appeal will not lie from an order granting an alternative writ of mandamus. The appeal only lies in such case from the final order made upon the trial of such alternative writ. *People ex rel. Lester v. Mitchel*, 39 St. Rep. 768, 21 Civ. Pro. 112, 15 Supp. 305. Where from the record it appears on an appeal from an order denying an application for a writ of mandamus, that the court below might have refused the application in the proper exercise of its discretion, the appellant in the Court of Appeals must show that the writ was refused on a question of law only ; if it were refused as a matter of discretion, the order refusing it will be affirmed. *People ex rel. D. L. I. Co. v. Jeroloman*, 139 N. Y. 14.

Where the granting or refusing of a writ is in the discretion of the court of original jurisdiction, and it does not appear upon the appeal that the discretion has been abused, the Court of Appeals will not review the proceeding. *Matter of Dederick*, 77 N. Y. 595. The Court of Appeals will not review the discretion of the lower court in quashing or amending a peremptory writ, which requires more than the respondent would be required to do. *People ex rel. Hasbrouck v. Supervisors*, 135 N. Y. 534, 48 St. Rep. 533. Where on appeal an order refusing a mandamus is reversed, the proper way of disposing of it, if the people refuse to proceed, is for the Special Term to deny the motion with or with-

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out costs, not by an order to proceed and setting it down for a hearing. *People v. New York Central & H. R. R. Co.*, 30 Hun, 78. The Court of Appeals will affirm the order granting a writ of mandamus where it has been issued and fully executed, there being no question of practical importance to decide. *People ex rel. 23d St. R. R. Co. v. Squire*, 110 N. Y. 667. The court may, in its discretion, refuse the writ of mandamus, and where, on appeal from an order denying the writ, the court below might have refused the writ in exercising its discretion, an appellant must show in the Court of Appeals, by the face of the order, that the writ was refused upon a question of law ; otherwise the order will be affirmed, and in such case the court will not look to the opinion of the General Term to ascertain the grounds for the refusal. *People ex rel. D. L. I. Co. v. Jeroloman*, 139 N. Y. 17.

Although no appeal lies from an order granting an alternative writ of mandamus, yet where the order was peremptory, except as to a portion of the relief prayed for, it is proper to consider the questions raised and to pass upon them on appeal. *Matter of Goodwin*, 30 App. Div. 418, 51 Supp. 355, 85 St. Rep. 355. The conclusion of the trial court as to the amount of damages upon the trial of an alternative writ is not reviewable by the Court of Appeals. *People ex rel. Deverell v. Mutual Protective Union*, 118 N. Y. 109. When costs are awarded as a matter of discretion, they are not subject to review upon appeal. *People v. Albright*, 14 Abb. Pr. 305. And where no question is raised as to costs in the court below, the question will not be considered on appeal. *People ex rel. Twenty-third St. Ry. v. Squire*, 110 N. Y. 667. When it is too late to correct a former mandamus by appeal, if the relator seeks redress by a new mandamus, the former orders may then be vacated. *People ex rel. Vandervoort v. Cooper*, 24 Hun, 337. The propriety of an order granting the writ of mandamus will not be considered upon an appeal from an order adjudging the defendant to be in contempt for disobeying the writ. *People ex rel. Garbutt v. Rochester, etc., R. R. Co.*, 76 N. Y. 294. On appeal it was held that where the fact did not affirmatively appear that the relator, before commencing the proceedings, had applied to the party to whom the writ was issued to correct the mistake, it was not a jurisdictional defect under the circumstances, requiring a reversal of the order. *Pro. ex rel. Nostrand v. Wilson*, 119 N. Y. 518.

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SUB. 3. CONTEMPT IN DISOBEYING WRIT.

Under the R. S. (2 R. S. 534), providing for the punishment as for a contempt of the disobedience to a lawful order, decree, or process of any court of record, it was held that the language was sufficient to embrace disobedience to a peremptory writ of mandamus. Such a mandamus was held to be an order of the court within the meaning of the statute. The fact that punishment as for a contempt could be had by statute (2 R. S. 586, § 54) to compel a return to an alternative writ is not exclusive. The mode of compelling a return to an alternative writ is properly described in the act relating to proceedings on mandamus, but that does not weaken the effect of the statute relating to contempts which renders punishable disobedience to any lawful order. *Peo. ex rel. Garbutt v. R. C. & L. R. R. Co.*, 76 N. Y. 300.

The above decisions would undoubtedly be applicable under § 14, Code of Civil Procedure, providing for punishment as for a contempt for disobedience to the lawful mandate of the court.

It should be noted that § 2073 of the Code of Civil Procedure provides for punishment for a contempt upon the default of a return to "the first writ of mandamus," unless it be an alternative writ of mandamus and a demurrer thereto is taken. This provision seems to be entirely separate from contempt proceedings had upon disobedience to the peremptory writ, whether the same be issued in the first instance or upon the trial of an alternative writ. Punishment for disobedience to the writ rests upon § 14, Code Civil Procedure, providing for the punishment of disobedience to the lawful mandate of the court.

It is a sufficient answer in proceedings to punish as for a contempt for disobedience to the writ, that the act sought to be enforced has been prohibited by injunction. And in such proceedings it is not proper for the court to vacate such injunction. *Peo. ex rel. Duffy v. Village of West Troy*, 25 Hun, 180. It seems that where a board of supervisors were commanded by mandamus to proceed and construct a bridge, which act they could not perform until the location and plans should have been approved by the secretary of war, where such consent of the secretary of war has been sought in good faith and cannot be procured, it will excuse delay in laying out the bridge in proceedings for contempt. *Peo. ex rel. Keene v. Supers.*, 142 N. Y. 278.

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An order was obtained directing the issuance of a mandamus, and a stipulation was entered into by the parties providing that an appeal be taken therefrom, and that no action be taken in the matter until the decision in the Court of Appeals upon such appeal, and that such matter should be then acted upon in accordance with such decision. In the evening of the same day upon which the Court of Appeals rendered its decision, the respondents took action contrary to the direction of the Supreme Court, and before the issuance of a formal writ of mandamus upon the decision of the Court of Appeals, which would prevent such action; *held*, that the respondents were guilty of contempt, and that it was not a defence that a formal written mandate, issued to enforce the decision of the court, had not been issued, if, at the time of taking such action, they knew what such decision was. Parties who violate an injunction are guilty of contempt, if they know that it was granted, although it had not been served upon them, and the same principle applies upon the violation of an order for a writ of mandamus. *Peo. ex rel. Platt v. Rice*, 80 Hun, 437, Mayham, J., dissenting, affirmed, 144 N. Y. 249.

The dissenting opinion is based upon the ground that though the order directing the issuance of a writ had been obtained, such order did not in itself operate as a mandamus. "Any other construction would be giving to an order for mandamus all the effect of a writ itself, and to render the issuance of a writ unnecessary and nugatory. No such practice could obtain, because to a writ of mandamus there must be a return as required by §§ 2073 and 2074 of the Code of Civil Procedure, and no return could be made to an order for a writ." A respondent cannot be punished as for a contempt in refusing to obey a peremptory writ, where the judge had no authority to issue it. *Peo. ex rel. Lower v. Donovan*, 135 N. Y. 76, 23 Civ. Proc. 6, reversing S. C. 63 Hun, 512, 45 St. Rep. 141, 18 Supp. 501.

CHAPTER VI.

PROHIBITION.*

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ARTICLE I.

THE CHARACTER AND PURPOSE OF THE WRIT.

The writ of prohibition is issued to forbid a court to which it is directed from proceeding in a suit or matter depending before such court upon the ground that the cognizance of such suit or action does not belong to it. Bacon's Abridgment, title "Prohibition."

It is an extraordinary judicial writ issuing out of a court of superior jurisdiction, and directed to an inferior court, and for

* See High on Extraordinary Remedies, Shortt on Extraordinary Remedies, and Spelling on same subject.

 Art. I. The Character and Purpose of the Writ.

the purpose of preventing the inferior tribunal from usurping a jurisdiction which does not belong to it. It is used to keep inferior courts within the limits and bounds prescribed for them by law. *People v. Works*, 7 Wend. 486; *People v. Supervisors*, 1 Hill, 195. And such being its object, its use in all proper cases should, says Judge Sheldon, in *Quimbo Appo v. People*, 20 N. Y. 531, be upheld and encouraged, since it is of vital importance to the due administration of justice, that every tribunal invested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law intrusted.

It is, however, to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress, and it is a principle of universal application, and one which lies at the very foundation of the writ of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. *Ex parte Braudlacht*, 2 Hill, 367.

Its office is, says Justice Cowen, in the same case, to prevent courts from going beyond their jurisdiction in the exercise of judicial, not ministerial, power; otherwise the writ might be sought whenever a justice of the peace was about to issue civil or even criminal process irregularly.

The writ will only issue to prevent some action "which is contrary to the general laws of the land"; no question but jurisdiction can be tried. Where, however, the statute has imposed restrictions as to the circumstances under which an "inferior court, or judge thereof," may act in matters otherwise within its jurisdiction, and these restrictions are disregarded, the party aggrieved may have a remedy by prohibition. *People v. Nichols*, 79 N. Y. 582. In *People ex rel. Adams v. Westbrook*, 89 N. Y. 152, it is said that the writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity, or by appeal, and it is not demandable as matter of right, but of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. It does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case which it had a right to adjudicate. In all cases, there-

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fore, where the inferior court has jurisdiction of the matter in controversy, the superior court will refuse to interfere by prohibition, and will leave the party aggrieved to procure the ordinary remedies for the correction of errors. *Ex parte Gordon*, 2 Hill, 363; *People v. Seward*, 7 Wend. 518. The writ of prohibition is a State writ, and, as stated in the note of the commissioners in Throop's Code, "it issues only to courts and judicial officers, acts only upon legal proceedings pending before those tribunals, almost invariably involves pure questions of law and aims only to procure a stay of proceedings." Although retained under the Code, the writ is confined in a narrow field of operation. *People ex rel. Baldwin v. Goldfogle*, 62 St. Rep. 71, 23 Civ. Pro. 419, 30 Supp. 296.

It is defined in McAdam on Landlord and Tenant, page 205, "as an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is the remedy afforded by the common law against the encroachments of jurisdiction by inferior courts, and is used to keep such courts within the limits and bounds prescribed for them by law."

Miller, J., in *United States v. Hoffman*, 4 Wall. 158, thus defines the writ of prohibition: "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which by the suggestion of the relator the court is informed he is about to do. If the thing is already done, it is manifest that the writ of prohibition cannot undo it, for that would require an affirmative act, and the only effect of a writ of prohibition is to suspend the action and to prevent any further proceedings in the prohibited direction."

It will be seen at once that, in general, the results to be obtained by a writ of prohibition may be also obtained by injunction. It was said by the commissioners in a note to the Throop Code that, "It was thought that this writ had survived its practical utility, and that all the practical benefits of the writ might be obtained by means of an injunction." The writ was retained, however, and it will be seen that cases might arise where it has an advantage over an injunction. An injunction restrains only the parties to an action or proceeding and restrains the lower court through its acquiescence only. In case of the wilful ignor-

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ing of an injunction by the court, there is no penalty in the same proceeding. With the writ of prohibition, however, it is different. The prohibition issues not only to the party plaintiff or defendant, but to the court itself, and a disobedience of the prohibition will bring the judge or the members of the court into contempt for such disobedience. (See Code Civil Procedure, § 2096.)

ARTICLE II.

WHEN THE WRIT LIES. BY WHAT COURT GRANTED.

§§ 2092, 2093.

SUB. I. WHEN THE WRIT LIES.

2. BY WHAT COURT GRANTED. § 2092, 2093.

SUB. I. WHEN THE WRIT LIES.

The codifiers, in reporting to the legislature their labors as to this portion of the Code, state that they have only undertaken to reach the methods of procedure, which they found exceedingly cumbersome and intricate, and have confined themselves to simplifying the proceedings, reducing them to order and making them as brief as possible.

It will not go to restrain an inferior court from proceeding on the ground of insufficiency of papers on which process was obtained, since the court itself may afford ample relief by appeal. *People v. Marine Court*, 36 Barb. 341. It will not be granted until it appears that the party aggrieved has applied in vain to the inferior tribunal for relief, and is to be used with great caution and forbearance for the furtherance of justice, and to secure order and regularity in judicial proceedings when ordinary remedies are not applicable. High on Ext. Rem. § 765. It issues only to prevent the commission of an act, and not to undo what has been already performed. *United States v. Hoffman*, 4 Wall. 158.

The writ will run, as is held by Justice Selden, in *Quimbo Appo v. People*, 20 N. Y. 531, in a matter of which a tribunal has jurisdiction where it goes beyond its legitimate power, and when handling matters clearly within its cognizance, it transgresses the bounds prescribed by law. It lies to prevent the exercise of an unauthorized power in a cause or proceeding of which the subordinate tribunal has jurisdiction, and its scope ought not to be abridged, as it is far better to prevent the exercise of an unau-

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thorized power than to be driven to the necessity of correcting the error after it is committed. The writ of prohibition will lie to a commissioner appointed by a foreign court who is about to issue process for contempt against a citizen of this State, for his refusal to answer certain interrogatories, where it appears that the relator was a minister of the Gospel, and was sought to be forced to reveal confidential confessions made to him as such. *People ex rel. Toy v. Mayer*, 71 Hun, 182. The writ of prohibition will lie against a surrogate to restrain him from taking any proceedings or issuing any order to remove an administrator from office, where the decree therefor is void. The court says: "As the contemplated action was the enforcement of a void decree, it was proper that the writ should issue in restraint of it." *People ex rel. Sprague v. Fitzgerald*, 15 App. Div. 539, 44 Supp. 556, 78 St. Rep. 556. It is well settled that the writ of prohibition will not lie where there is a remedy by appeal, and thus it was refused where a justice erroneously refused to accept an undertaking given to remove a cause from a district court of New York to the Court of Common Pleas, there being an appeal from such refusal. *People ex rel. Reynolds Card Mfg. Co. v. Fourth District Court*, 13 Civ. Pro. 134. The writ will not issue against a justice of an inferior court to restrain him from proceeding in a summary proceeding to recover possession of land, on the ground that he has not jurisdiction of the subject-matter, where it is not proven that he will not decide the case in accordance with the law and the facts, and if proper dismiss the proceeding. *People ex rel. H. P. C. Co. v. Kelly*, 12 Civ. Pro. 414. Prohibition will not lie against the justice of a district court to prevent him hearing a summary proceeding to recover real property even though a plea of title to real estate was made and a bond for the removal of the cause was tendered, because such justice has the right to try the questions involved, upon which trial he may, if a question of title appears to be involved, dismiss the proceeding. *People ex rel. Baldwin v. Goldfogle*, 23 Civ. Pro. 417, 30 Supp. 296, 62 St. Rep. 70.

The writ of prohibition will lie against a justice of the peace to restrain the prosecution of an action, where the summons was served on a party attending an action on trial at a circuit in a court other than that in which he resided, the defendant being exempt from such service by law. *People ex rel. Hess v. Inman*, 74 Hun, 130, 55 St. Rep. 872, 26 Supp. 329. The writ of prohi-

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bition has been held to lie against the judge of an inferior court who proceeds to try, either himself or by his subordinate, a cause in which he is interested. *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *State v. Judge*, 38 La. Ann. 247. Where a remedy exists by appeal or otherwise to correct an error of law or practice, the writ will not be granted. *People ex rel. v. Clute*, 42 How. 157; *People ex rel. v. Nichols*, 79 N. Y. 582. It should be issued only in cases of extreme necessity and not for grievances which may be redressed by ordinary proceedings at law, or in equity, or by appeal. *People ex rel. v. Westbrook*, 89 N. Y. 152. The same principle is decided in the following cases: *People v. Common Pleas*, 43 Barb. 278; *Ex parte Braudlacht*, 2 Hill, 367; *People v. Russell*, 19 Abb. 136; *Sweet v. Hulbert*, 51 Barb. 312; *People v. Marine Court*, 36 id. 341; *People v. Talcott*, 21 Hun, 591. It is not intended to be used to correct errors which may arise on a trial and may be corrected on appeal. *People v. McAdam*, 2 Civ. Pro. 86. It was not intended the writ should be used as a means of interfering with the orderly practice of the courts, or as a method of staying summary proceedings. *People v. Parker*, 63 How. 3; *People v. Rinell*, 19 Abb. 136. It is a preventive and not a corrective remedy. *People v. Commissioners of Excise*, 61 How. 514; *Thompson v. Tracy*, 60 N. Y. 31. The scope of the writ and cases in which it is proper, and principles governing its use, are fully discussed in the case last cited, covering very many of the matters heretofore discussed, and the case will be found an authority upon numerous points as to the practice under the writ; among other things, that the Revised Statutes did not change the character of the writ, or permit any question except that of jurisdiction to be raised or tried under it. This principle seems to be equally applicable under the present Code. It is further held that an appeal will not be restrained by the writ, and that the writ issuing out of the Supreme Court can in nowise affect the practice or jurisdiction of the Court of Appeals, or the rights of the parties to its process or a hearing therein, these questions being for that court to determine. In a recent case reiterating the rule that the writ is not a writ of right and will not be granted in a case where another adequate remedy exists, it was refused against a referee to prevent him from opening a case after it had been submitted. *People v. County Court of Kings*, 23 Week. Dig. 137. The writ lies to

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restrain proceedings of supervisors, judicial in their nature, under a notice which confers no jurisdiction. *People v. Supervisors*, 63 How. 411. The writ issues to prevent a court from trying a case between sailors and officers of a foreign vessel where a treaty stipulated what courts should have jurisdiction. *People v. Marine Court*, 6 Hun, 214. It lies to determine the jurisdiction of surrogates of different counties dependent upon the residence of a decedent. *People v. Waldron*, 52 How. 221. It lies to restrain the removal of a city officer by the mayor where he does not possess the power of removal. In such a case the mayor acts judicially. *People v. Cooper*, 57 How. 416. It will also issue to prevent an officer from proceeding under an unconstitutional statute. *Sweet v. Hulbert*, 51 Barb. 312. It will not issue to restrain the board of police justices of New York City in appointing and removing clerks of courts, since in so acting they do not act as a court. *Norton v. Dowling*, 46 How. 7. It will not interfere with the exercise of ministerial as distinguished from judicial powers. *People v. Supervisors of Queens*, 1 Hill, 201; *Ex parte Braudlacht*, 2 id. 367. Nor will it lie on a mere point of practice where the court has jurisdiction of the general subject of the cause. *People v. Marine Court*, 36 Barb. 341; *People ex rel. v. Oyer and Terminer*, 27 How. 14; *People v. Russell*, 49 Barb. 351, 14 Abb. 266. It will not be granted to a relator who has been aggrieved because of the irregularity of the form of a judgment and who has a plain remedy by application to the court, which rendered it, for correction, even if a court is assuming to act without authority, and the relator can protect himself by proper objections and by exceptions when the case is on trial, and by appeal from the decision. *People ex rel. Salke v. Talcott*, 21 Hun, 591. A writ of prohibition will not issue to prevent a judge of a district court in New York City from entertaining and acting on an application to open a default taken before him. *People ex rel. Lumm v. Langbein*, 12 Week. Dig. 20. There must be a violation of a statutory restriction or an unlawful exercise of jurisdiction; an error in practice affords no grounds for the writ. *People ex rel. Mayor v. Nichols*, 79 N. Y. 582. It does not lie when a court has only overruled preliminary objections and the relator can have a remedy against a final order by injunction. *People ex rel. Cook v. Parker*, 63 How. 3. The common-law rule that prohibition is a preventive remedy and not a corrective one

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is said, in *People ex rel. Gould v. Commissioners of Excise of New York*, 61 How. 514, not to have been changed by the Code of Civil Procedure. A writ when granted will not operate to restrain the party named therein generally, or from doing any act save proceeding in the prohibited suit or matter. *Thompson v. Tracy*, 60 N. Y. 31. The writ will not be issued to restrain a surrogate from taking proof of a will offered for probate on the ground that the decedent was not a resident of the county, under the rule that it will not be allowed where the relator has an adequate remedy by appeal. *People ex rel. James v. Surrogate of Putnam*, 36 Hun, 218. While a magistrate is proceeding within the scope of his jurisdiction and is chargeable with no malice or misconduct, his proceedings cannot be arrested by the writ of prohibition, however erroneous or irregular his decisions may be. *People ex rel. Smith v. Grogan*, 3 N. Y. Crim. R. 335, citing the leading cases. The writ will not issue to determine whether a surrogate is a creditor where citation is issued on his own petition to executors, he acting as receiver and another person acting as surrogate under the statute. This is properly determined on appeal. *People ex rel. Oakly v. Petty*, 32 Hun, 443. Where an accused person elects to be tried by court having jurisdiction, a writ of prohibition will not be granted against the court, though its judgment is erroneous, if there is a remedy by appeal. *People ex rel. Vatham v. Court of Special Sessions*, N. Y. Daily Register, Jan. 3, 1884.

The writ of prohibition will not issue to restrain summary proceedings where the petition presents facts proper for the consideration of the officer to whom it is directed, but defendant should litigate the matter in the proceeding. *People ex rel. Browne v. McAdam*, 2 Civ. Pro. 52. Where the justice has jurisdiction of the case and the subject-matter, prohibition is not proper. *People ex rel. v. McAdam*, 84 N. Y. 287, reversing 22 Hun, 559. Where the justice has jurisdiction of the proceedings the writ will not lie to restrain the execution of the warrant to dispossess the tenant, upon the ground of an error of the justice in the proceedings. The remedy is by appeal. Citing *Knox v. McDonald*, 25 Hun, 268; *People v. Letson*, 3 How. (N. S.) 381. Prohibition will lie where, although there is jurisdiction on proper allegations in general, yet there is none on the facts stated in the applicant's affidavit for the order to show cause. The juris-

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diction is special and limited, and the magistrate is strictly confined to the terms of the act; a cause must be shown by the papers which is within the statute before the magistrate can act. *People ex rel. v. McAdam*, 22 Hun, 559, reversed on another point, 84 N. Y. 287, *supra*. A writ of prohibition should not issue except where the court has no jurisdiction or is proceeding in excess of its jurisdiction. The remedy for any error in the proceeding itself, or for any wrongful decision by the justice, is by appeal. *People ex rel. v. Goldfogle*, 23 Civ. Pro. 417. While an action was pending in the city court of New York, the defendant was adjudged a lunatic, and her committee appeared as a party and set up a defence that no leave to sue him had been granted, *held*, that the city court could not proceed, and that the Supreme Court could restrain it from so doing. *Matter of Delehanty*, 28 Abb. N. C. 245, 44 St. Rep. 836, 18 Supp. 395. Where an action of the board of supervisors was being taken for the purpose of collecting the expenses paid by the county for the support of indigent and insane persons, not paupers, from the respective towns wherein they resided when sent to the asylum, *held*, that the issuing of a writ of prohibition to restrain such action was proper. *People ex rel. Town of Blenheim v. Supervisors of Schoharie*, 121 N. Y. 345, reversing 49 Hun, 308.

SUB. 2. BY WHAT COURT GRANTED.

§ 2092. When writ granted at Special Term.

Except where special provision therefor is otherwise made in this article, an alternative writ of prohibition can be granted only at a Special Term of the court. In the Supreme Court the Special Term must be one held within the judicial district embracing the county wherein the action is triable or the special proceeding is brought, in the course of which the matter sought to be prohibited by the writ originated.

L. 1873, ch. 70, § 1; see § 2068.

§ 2093. [Am'd, 1895.] Id.; by the appellate division of the Supreme Court.

An alternative writ of prohibition may be granted at a term of the appellate division of the Supreme Court only, directed generally to any judge holding, or to hold, a Special Term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the Supreme Court, directed to any other court or to a judge thereof. Such a writ can be granted only at the term of the appellate division of the judicial department embracing the county wherein the action is triable or the special proceeding is brought, in the course of which the matter sought to be prohibited by the writ originated, unless a term of the appellate division of said department is not in session; in which case it may be granted at a term of the appellate division in an adjoining judicial department.

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ARTICLE III.

THE ALTERNATIVE WRIT AND PROCEEDINGS THEREON.

§§ 2091, 2094, 2095.

§ 2091. **Kinds of writ; how granted.**

A writ of prohibition is either alternative or absolute. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor, and either with or without previous notice of the application, as the court thinks proper.

§ 2094. **Alternative writ must issue first; its contents.**

Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued until an alternative writ has been issued and duly served and the return day thereof has elapsed. The alternative writ must be directed to the court in which, or to the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. It must command the court or judge and also the party to desist and refrain from any further proceedings in the action or special proceeding, or with respect to the particular matter or thing described therein, as the case may be, until the further direction of the court issuing the writ; and also to show cause, at the time when, and the place where, the writ is made returnable, why they should not be absolutely restrained from any further proceedings in that action, special proceeding, or matter. The writ need not contain any statement of the facts or legal objections upon which the relator founds his claim to relief.

L. 1873, ch. 70, § 61, in part; see § 2076,

§ 2095. [Am'd, 1895.] **Id.; when returnable; how served.**

The writ must be made returnable, either forthwith or at a day certain, before the term which granted it, or upon the first day of a future term therein specified at which application for the writ might have been made. Where it is granted at a term of the appellate division in a judicial department adjoining that wherein the matter originated, it may, in the discretion of the court, be made returnable at a term of the appellate division of either department. The writ must be served on the court or judge, and also upon the party, as prescribed by law for the service of an alternative writ of mandamus. A copy of the papers upon which it was granted must be delivered with each copy of the writ.

Petition for Writ. (74 Hun, 130.)*To the Supreme Court of the State of New York:*

The petition of Frederick Hess, by Thomas Richardson, of Illion, Herkimer County, N. Y., as his attorney in fact and at law, respectfully shows to the court:

That your petitioner, said Frederick Hess, resides in the town of Long Lake, in the county of Hamilton, in the State of New York, and has there resided for the space of upwards of one year. That on or about the 3d day of November, 1892, Horace Inman, who resides and then resided in the city of Amsterdam, in the county of Montgomery, said State, commenced an action in the Supreme Court of said State, as sole plaintiff, against your petitioner as sole defendant, laying and making the place of trial in Montgomery County, said action having been commenced by the personal service of a summons upon your petitioner at his said residence in the town of

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Long Lake. That your petitioner retained the firm of Thomas & A. D. Richardson, who resided at Illion, Herkimer County, N. Y., and who are attorneys of the Supreme Court, as his attorneys to defend such action.

That issue was joined in said action by the service of an answer upon H. B. Waldron, the plaintiff's attorney, by said Thomas & A. D. Richardson on or about the 10th day of December, 1892, and that the case was duly placed on the calendar of and for the January term of the Circuit Court, held in Montgomery County, also by both parties.

That on Friday, January 20, 1893, the said cause was duly called in its order for trial at said Circuit, his Honor, Justice Stover, presiding, and the trial of the same was duly moved by your petitioner through his attorneys; and that the plaintiff's attorney and counsel announced that they were not ready for trial on the part of the plaintiff, by reason of the fact of the plaintiff's absence, and that they could not safely proceed to trial without him, and that he was a material witness in his own behalf; whereupon, on motion of the defendant, the complaint in said action was dismissed, and an order dismissing it was, as your petitioner is informed and believes, entered by the clerk in attendance upon said court in his minutes of the proceedings of said court. But no further or formal order and no judgment has been entered in said cause.

That the sessions of the said Circuit Court were held at the city council chambers in the city of Amsterdam, which for said purposes constituted the court-room or court-house, and said room was situated in the upper story, reached by three or four flights of stairs.

That upon the direction of the court dismissing the complaint, and before your petitioner had left the court-room, and before he had had time to leave the court-room, he was called by some one representing himself as a constable, just outside of the door of the court-room, a few feet, on the landing leading into the court-room, and was there served with a summons, a copy of which is hereto annexed. That your petitioner was attending the said circuit court solely as a party and as a witness in his own behalf in said action in the Supreme Court, and that he was a necessary and material witness. That the court was still in session when the said justice's court summons was served upon your petitioner as aforesaid.

That your petitioner was brought before the jurisdiction of the justice of the peace who issued said summons by and in consequence of his attendance at said Circuit Court, and that the said justice thereof would have had no jurisdiction over the person of your petitioner had he not been brought within said county of Montgomery by and through his attendance as aforesaid on the said Circuit Court.

That, as your petitioner is informed and believes, the action in said justices' court is brought by the said Horace Inman as sole plaintiff against your petitioner as sole defendant for the same identical cause of action for which the said action was brought in the Supreme Court, which last named action is still pending.

That your petitioner is informed and believes that said service of said justice's summons upon him was in the actual or constructive

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presence of said Circuit Court, then and there being held as aforesaid; and that it was a violation of the rights of your petitioner by reason of the facts aforesaid, and of the protection to which he was entitled as a party and as a witness aforesaid, and that the service upon your petitioner as aforesaid constituted a contempt of the Supreme Court, and of the Circuit Court, then and there being held as aforesaid, and of the justice presiding at the said court.

Wherefore, your petitioner prays that a writ of prohibition be issued out of this court, directed to A. B. Flansburgh, the justice of the peace who issued said summons, and to Horace Inman, the plaintiff therein.

FREDERICK HESS.

By THOMAS RICHARDSON,

His Attorney in Fact and at Law.

(Add verification.)

Petition for Writ. (15 App. Div. 531.)

SUPREME COURT OF THE STATE OF NEW YORK, IN THE
SECOND JUDICIAL DISTRICT.

CITY AND COUNTY OF NEW YORK, ss. :

Edward Sprague, being duly sworn, says that he and Abigail Journeay, of the county of Richmond, are administrators of the estate of David H. Journeay, deceased, and were duly appointed by the surrogate of the county of Richmond. That on the 4th day of October, 1894, Mary L. Englebrecht, one of the next of kin of the above-named decedent, filed a petition in said surrogate's court for the removal of said administrators upon charges of conspiracy and misconduct in relation to a certain promissory note made by the decedent to his mother, Abigail Journeay, and the conduct of the litigation in reference to the same; and the said surrogate, being within prohibited degrees of relationship to the said parties, the matter was taken before Thomas W. Fitzgerald, Esq., district attorney of said county, as acting surrogate, and a citation was issued thereupon to the said administrators to show cause why they should not be removed, a copy of which petition and citation are hereto annexed.

An answer to the said petition, verified November 12, 1894, denying all the allegations of conspiracy or misconduct alleged in the petition, was filed, a copy of which is hereto annexed, and a trial was had before said acting surrogate upon the issue so raised, occupying many hearings and a long period of time. Upon the close of the proofs presented by the petitioner the said administrators moved for a dismissal of the said petition on the ground that no facts had been proved to authorize their removal. The said acting surrogate thereupon found that the said administrators were not guilty of the misconduct charged in the petition and that no ground had been established for their removal, and that the petition and charges therein contained should be dismissed, as appears by his decision bearing date July 10, 1895, and by certain additional findings bearing date August 16, 1895, copies of which are hereto annexed. That the con-

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spiracy and misconduct alleged in the petition were that the said administrators had conspired together by means of a certain false and fraudulent promissory note to swindle the estate, and in an action brought in the Supreme Court against the said estate upon said note by laying a trap and drawing the answer to the complaint in said action to deceive the said petitioner and her counsel, so that they were defeated in the action.

The fact was, however, and the acting surrogate so found, that the said answer was drawn and dictated by the counsel for the said petitioner, and the trial of the case conducted by him, and that said petitioner and her counsel were alone responsible for any error committed therein, and that the administrators had done everything that was necessary and proper upon their part to enable the petitioner to litigate any and all defences which she thought the facts of the case justified, and that a verdict was rendered for the plaintiff in said action, and that the administrators upon the dismissing of said petition allowed an appeal to be taken to the General Term of the Supreme Court and to be argued and conducted by her own counsel, and that said judgment was in all respects affirmed.

Deponent further says that, notwithstanding the decision as aforesaid, the said acting surrogate made a decree thereon, bearing date August 16, 1895, and entered in the office of the surrogate of said county on the 17th day of August, 1895, whereby he directed that the said administrator, Edward Sprague, within four days after the service upon him of a copy of the decree, and certain other papers named in said decree, take an appeal from the said judgment of the General Term of the Supreme Court affirming judgment on said promissory note to the Court of Appeals, and that if he failed to do so the said petitioner, Mary E. Englebrecht, might apply to the court for the immediate removal of both of said administrators, *ex parte*, and for her appointment as administratrix of said estate, and also directing that the costs and expenses of the proceeding, including allowances to the said petitioner amounting to \$830, be paid out of the estate, a copy of which decree is hereto annexed.

Deponent further says that he has taken an appeal from the said decree to the General Term of the Supreme Court, and has caused a bond to be given and filed in pursuance of statute, and that the execution of said decree and all proceedings under it are, as he is advised, thereby lawfully stayed, pending said appeal; but he is informed and believes, notwithstanding said stay, and in violation thereof, that the said acting surrogate and said petitioner, without any power, jurisdiction, or authority of law, threaten, intend, and are about, at the expiration of the time allowed in said decree for your petitioner to comply with said order, and, upon his failure to do so, to wit, on the 23d day of August, 1895, to make an order *ex parte*, and without notice, forthwith removing your petitioner and also the said Abigail Journeay, as administrators of said estate, and appointing the said petitioner, Mary L. Englebrecht, administratrix in their place and stead.

Your petitioner further says that he is advised and verily believes

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that the said acting surrogate had no power, jurisdiction, or authority to make the order directing the said administrators to appeal to the Court of Appeals from the said judgment of the General Term of the Supreme Court in any event, but particularly after a fair trial upon the merits, and a verdict for the plaintiff, and the affirmance of judgment by the General Term, or to compel them to allow the attorney for your petitioner to take the proceedings in said action named in said decree in their name.

That he has no power, jurisdiction, or authority to remove the said administrators for disobedience to said order or decree, without notice or hearing, and upon the *ex parte* application of the said petitioner, nor in any other manner than that prescribed by statute, to wit, upon petition and charges to be approved, and a citation duly issued; and the said acting surrogate has no power, jurisdiction, or authority to appoint the said petitioner as administratrix without the issuance of a citation to the next of kin equally entitled with her to administer, to wit, to her sister, Susan Sprague, next of kin to the decedent, with said Mary L. Englebrecht, and equally entitled with her to administer.

Your petitioner further says that he is advised and believes that the order of removal of said acting surrogate will not only be without jurisdiction or authority of law, but will be oppressive to said administrators, and that adequate relief can only be had by a writ of prohibition restraining the said acting surrogate from further proceedings in such matter or under said decree or order in said proceeding.

Wherefore, your petitioner prays this court for himself and for said Abigail Journeay for a writ of prohibition to issue out of this court to the surrogate's court of Richmond County, and Thomas W. Fitzgerald, district attorney and acting surrogate of said county, and to Mary L. Englebrecht, prohibiting the said surrogate's court and the said district attorney and acting surrogate from taking any proceeding under said decree for the removal of the said Edward Sprague and Abigail Journeay, administrators of David H. Journeay, or either of them, for the appointment of said Mary L. Englebrecht or any other person as administratrix or administrator in their place, or for the enforcement of said decree in that behalf, and prohibiting and restraining the said Mary L. Englebrecht from carrying into effect or proceeding upon said decree, and for such other and further relief as may be just.

And deponent further says that no prior application has been made for such writ.

EDWARD SPRAGUE.

(Add acknowledgment.)

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Precedent for Order for Alternative Writ by Special Term.

At a Special Term of the Supreme Court, held at the court-house at Caldwell, in and for the fourth judicial district, on the 21st day of March, 1886:

Present:—Hon. Joseph Potter.

The People *ex rel.* Henry C. Adams,
agst.

Zerah S. Westbrook, Surrogate of the County
of Montgomery, and Jacob C. Nellis, Execu-
tor, etc., of Peter G. Fox, deceased.

} 89 N. Y. 152.

On reading and filing the affidavit of Henry C. Adams, it is ordered that a writ of prohibition issue out of this court to the surrogate's court of Montgomery County, and Zerah S. Westbrook, surrogate, and to Jacob C. Nellis, executor, etc., commanding the said court to desist and refrain from making any distribution whatever of the funds of the estate of Peter G. Fox, deceased, and from the publication of notice of such distribution to the creditors of said deceased until the final decision of the Supreme Court in the action therein described, and that said writ be returnable on the second Tuesday of April next, at the opening of the court on that day, at the chambers of the Hon. Joseph Potter, at Whitehall.

JOSEPH POTTER,
Justice.

Order to Show Cause with Stay:—Short Form.

At a Special Term of the Supreme Court, held at the chambers of the justice of the city of Amsterdam, in and for the fourth judicial district, on the 24th day of January, 1893:

Present:—Hon. Martin L. Stover, *Justice.*

People *ex rel.* Frederick Hess
agst.

A. B. Flansburgh, a justice of the peace, etc.,
and Horace Inman.

} 74 Hun, 150.

On reading and filing the petition of Frederick Hess, by Thomas Richardson, his attorney in fact and at law, verified January 23d, 1893, and the affidavit of Frederick Hess verified January 20th, 1893, it is

Ordered, that a writ of prohibition issue out of this court to A. B. Flansburgh, justice of the peace in and for the county of Montgomery, and to Horace Inman, defendants, commanding said justice and said Horace Inman to desist and refrain from any and all further proceed-

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ings in a certain action commenced in the court of the said justice of the peace on the 20th day of January, 1893, by said Horace Inman as plaintiff against Frederick Hess, relator herein, as defendant, and now pending in said justices' court, until the further direction of this court; and that the said defendant show cause at a Special Term of this court on the fourth Tuesday of February, 1893, at the opening of court on that day, at the chambers of Hon. Martin L. Stover, in the city of Amsterdam, why they should not be absolutely restrained from any further proceeding in that action.

Enter in Montgomery County.

M. L. S.

Order to Show Cause with Stay, with Full Recitals.

(15 App. Div. 531.)

The People of the State of New York to THOMAS W. FITZGERALD, District Attorney and Acting Surrogate of the County of Richmond, in said State, and to MARY L. ENGLEBRECHT, greeting:

WHEREAS, Edward Sprague, of the said county of Richmond, has presented to the Supreme Court of the State of New York the facts upon affidavit, and the papers accompanying the same, that he and Abigail Journeay were duly appointed administrators of David H. Journeay, deceased; that Mary L. Englebrecht, one of the next of kin of said decedent, took proceedings before Thomas W. Fitzgerald, district attorney and acting surrogate (the surrogate of said county being disqualified) for the removal of the said administrators upon charges of alleged conspiracy and misconduct; that the said administrators duly filed an answer denying said charges, and a trial was had before said acting surrogate, who found the said administrators were not guilty of said charges, and that there was no ground for their removal, and a decree to that effect was duly entered by him in the surrogate's court of said county on the 17th day of August, 1895; but that said surrogate made and inserted in said decree, without any jurisdiction, power, or authority of law, an order that the said Edward Sprague, as administrator of said estate, should appeal to the Court of Appeals from a certain judgment of the General Term of the Supreme Court, affirming the judgment obtained by David H. Sprague against said administrators for the recovery of a promissory note of \$5,000, made by said decedent, upon a trial had before Hon. Edgar M. Cullen and a jury, resulting in a verdict for the plaintiff establishing the validity of said note; that said acting surrogate further made and inserted in said decree, without any jurisdiction, power, or authority of law, an order that if the said Mary L. Englebrecht, who was desirous that the said Edward Sprague should allow her attorney to make application for a new trial in said action, or take any proceedings in the Supreme Court in said action; and to prepare and certify such papers in the name of said administrators as should present the said questions desired by the said Mary L. Englebrecht, and in like manner without jurisdiction, power, or authority of law, did make and insert in said decree a further order that the said Mary L. Englebrecht might take an *ex parte* appli-

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cation to the said acting surrogate for the immediate removal of the said administrators should the said administrators disregard the said unauthorized provisions and directions of said decree; that the said administrators have taken an appeal from said decree to the General Term of the Supreme Court, and have filed an undertaking in pursuance of the statute, but that the said acting surrogate and the said Mary L. Englebrecht threaten and intend and are about, at the expiration of the time allowed for said Edward Sprague to comply with said order and decree, to wit, the 23d day of August, 1895, and upon his failure to do so, to make an order *ex parte*, and without notice and without further petition, citation, or hearing, and without issuing a citation to Susan Sprague, a sister of said Mary L. Englebrecht and next of kin to said decedent, and equally entitled to administer on said estate, and appointing the said Mary L. Englebrecht administratrix in their place; and that the order of removal by said surrogate and appointment of said Mary L. Englebrecht as administratrix in their stead will not only be without jurisdiction or authority of law, but will be oppressive to said administrators and to the said Abigail Journeay as one of the next of kin, and that adequate relief can only be had by a writ of prohibition restraining the said acting surrogate and Mary L. Englebrecht from further proceedings in such matter and under said decree and order; wherefore, the said Edward Sprague and Abigail Journeay have prayed relief of our said court and our order of prohibition on that behalf.

We, therefore, being willing that the laws and customs of our State should be observed, and that our citizens should in no wise be oppressed, do command you that you desist and refrain from taking any proceedings under said decree made and entered by you, Thomas W. Fitzgerald, in the surrogate's court of Richmond County on the 17th day of August, 1895, as acting surrogate, for the removal of Edward Sprague and Abigail Journeay, administrators of David H. Journeay, or either of them, or for the appointment of Mary L. Englebrecht or any other person, as administrators or administratrix in their place, or for the enforcement of said decree in that behalf; and that you, Mary L. Englebrecht, desist and refrain from carrying into effect or proceeding upon the said decree in that behalf until further direction of this court.

And that you show cause on the 27th day of August, 1895, at or after 10 o'clock in the forenoon, before a Special Term of the Supreme Court at the court-house in the city of Brooklyn, county of Kings, why you should not be absolutely restrained from taking any proceeding under the said decree as aforesaid for the removal of the said Edward Sprague and Abigail Journeay, or either of them, or for the appointment of Mary L. Englebrecht, or any other person, as administratrix or administrator, in their place, or for the enforcement of the said decree in that behalf.

Witness: Hon. Wm. J. Gaynor, one of the justices of the Supreme Court, at the court-house in the county of Kings, on the 23d day of August, 1895.

By the court.

JOHN W. ELSWORTH,
Clerk.

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Form of Alternative Writ of Prohibition. (89 N. Y. 152.)

The People of the State of New York to ZERAH S. WESTBROOK, County Judge and Surrogate of Montgomery County, in said State, and to JACOB C. NELLIS, executor of the last will and testament of PETER G. FOX, deceased, greeting :

WHEREAS, Henry C. Adams, of the city of New York, has presented to the Supreme Court of the State of New York, on the 21st day of March, 1886, the fact upon petition and affidavit, and the papers accompanying the same in printed form, that an action was commenced by him as the plaintiff, by service of a summons and complaint upon Peter G. Fox, executor of the last will and testament of Archibald Fox, deceased, and Lawrence M. Fox, defendants, on or about the 1st day of August, 1872, to recover of Peter G. Fox, personally, the amount due upon three several judgments, viz. : (here state facts as in petition) : Wherefore the said Henry C. Adams has prayed relief of our said court, and our writ of prohibition in that behalf. We, therefore, being willing that the laws and customs of our State should be observed, and that our citizens should in nowise be oppressed, do command you that you desist and refrain from any further proceeding in the matter of exhibiting, proving, examining, deciding upon or intermeddling in any manner with the said claims and demands of the said relators, so pending and undetermined in said action, and awaiting the adjudication and decree of the Supreme Court, and that you make no order, decree, or adjudication in respect to the claims and demands of other creditors of said estate, inconsistent with or in any manner prejudicial to the rights, interests, claims, and demands of the said relator, Henry C. Adams, until the final adjudication, decree, or judgment of said Supreme Court, in the said action so pending therein as aforesaid ; and then only in the manner and form, and in accordance with the decree and judgment of the said Supreme Court therein, or the further order of this court.

And also that you desist and refrain from making any distribution whatever of the said funds of said estate, and from publication of notice of such distribution among the creditors of said deceased until the final distribution, decree, or judgment of said Supreme Court, in the said action so pending and undetermined therein, as stated, and then only in the manner and form, and in accordance with the decree and judgment of the said Supreme Court therein, or the further order of this court.

And that you show cause on the second Tuesday of April, 1886, at ten o'clock A. M. of said day, before the Special Term of the Supreme Court of the State of New York, at chambers of Hon. Joseph Potter, in Whitehall, N. Y., why you should not be absolutely restrained from any further proceedings in respect to the said claims and demands of said relator, or the claims and demands of other creditors of said estate, inconsistent with or prejudicial to the said rights, claims and demands of said relator ; and also from making any distribution whatever of the said funds of said estate, and from publication of notice of such distribution among the creditors of said deceased, until the final adjudica-

 Art. 3. The Alternative Writ and Proceedings Thereon.

tion, decree, or judgment of the Supreme Court, in the said action so pending and undetermined therein, as aforesaid, or the further order of this court.

Witness, the Hon. Joseph Potter, one of the justices of the Supreme Court, at the court-house, in the county of Warren, the 21st day of March, A. D. 1886.

By the court.

DANIEL V. BROWN,
Clerk.

HENRY C. ADAMS, *Relator*,
Attorney in Person.

Indorsed:—"The within writ of prohibition is hereby allowed this 21st day of March, 1886, by the court.

"JOS. POTTER,
"Justice Supreme Court."

Alternative Writ. (74 Hun, 130.)

The People of the State of New York to A. B. FLANSBURGH, a justice of the peace, etc., and to HORACE INMAN, greeting:

WHEREAS, Frederick Hess, of the town of Long Lake, in the county of Hamilton, State of New York, did present to the Supreme Court of the State of New York on the 24th day of January, 1893, the facts upon petition and affidavit, and the papers accompanying the same, that on or about the 3d day of November, 1892, Horace Inman, who resides and then resided in the city of Amsterdam in the county of Montgomery in said State, commenced an action in the Supreme Court of said State, as sole plaintiff, against said Hess, as sole defendant, laying and making the place of trial in said Montgomery County, said action having been commenced by the personal service of a summons upon said defendant at his residence in said town of Long Lake. That issue was duly joined in said action, and that said cause was duly noticed for trial and duly placed upon the calendar of and for the January term, 1898, of the Circuit Court, held in Montgomery County, by both said plaintiff and said defendant.

That on Friday, January 20th, 1893, the said cause was duly called in its order for trial at said circuit by his honor, Justice Stover, presiding, and the trial of the same was duly moved by the said defendant through his attorneys; that the said plaintiff Inman, through his attorney and council, announced that he was not ready for trial by reason of the fact of the plaintiff's absence, and that they could not safely proceed to trial without him and that he was a material witness in his own behalf; whereupon, on motion of the said defendant Hess, the complaint in said action was dismissed and an order to that effect entered in the minutes of the clerk of said court; but that no further or formal order, and no judgment, have or has been entered in said cause.

That immediately after the direction of the court dismissing the complaint, and in the actual and constructive presence of the court, the said Frederick Hess was served with a summons emanating from a court of the justice of the peace, issued by A. B. Flansburgh, a

 Art. 3. The Alternative Writ and Proceedings Thereon.

justice of the peace, in and for the county of Montgomery, N. Y., commanding the said Frederick Hess to appear before the said A. B. Flansburgh, as said justice, on the 27th day of January, 1893, at one o'clock in the afternoon of that day at his office, No. 33 East Main Street, in the city of Amsterdam, to answer the complaint of the said Horace Inman in an action in which said Horace Inman was sole plaintiff, and the said Frederick Hess was the sole defendant, the cause of action being identically the same as the said action against the said Hess in the Supreme Court hereinabove named and described, the said action in the Supreme Court being then still pending and undetermined.

That said Frederick Hess, the relator herein, residing as aforesaid in the town of Long Lake, in the county of Hamilton, said State, and outside the jurisdiction of the said justice of the peace, and of his said court, attended and was present at the said term of the Circuit Court solely as a party and as a witness in his own behalf, and for no other reason or purpose whatsoever; and that said Frederick Hess was brought before the said jurisdiction of the said justice of the peace by and in consequence of his attendance at the said Circuit Court, and that the said justice would have had no jurisdiction over the person of the said defendant Hess had he not been brought within the said county of Montgomery by and through his attendance as aforesaid on said Circuit Court.

Wherefore, said Frederick Hess has prayed relief of our said court and our writ of prohibition in that behalf;

We, therefore, being willing that the laws and customs of our State should be observed, and that our citizens should in nowise be oppressed, do command you and each of you that you desist and refrain from any and all further proceedings in said certain action commenced in the court of said justice of the peace on the 20th day of January, 1893, by said Horace Inman, as plaintiff, against Frank Hess, relator herein, as defendant, and now pending in said justices' court until the further determination and direction of this court; and that you and each of you show cause at a Special Term of this court on the fourth Tuesday of February, 1893, at the opening of court on that day, at the chambers of Hon. Martin L. Stover, in the city of Amsterdam, why you and each of you should not be absolutely restrained from any further proceedings in that action.

Witness: Hon. Martin L. Stover, one of the justices of the Supreme Court, at the court-house in the county of Montgomery on the 24th day of January, 1893.

JOHN F. COLLINS,
Clerk.

Indorsed:—"The within writ of prohibition is hereby allowed this 24th day of January, 1893.

"JOHN F. COLLINS,
"Justice Supreme Court."

 Art. 3. The Alternative Writ and Proceedings Thereon.

Precedent for Order for Alternative Writ by Appellate Division.

At a term of the Appellate Division of the Supreme Court, appointed by the Governor of the State of New York, held in and for the first department, at the court-house, in the city and county of New York, on the 20th day of September, 1879 :

Present :—Hon. Noah Davis, *Presiding Justice* ; John R. Brady and George C. Barrett, *Justices*.

The People of the State of New York, on the relation of Edward Cooper, Mayor of the City of New York,

agst.

The Special Term at Chambers, now being held in and for the City and County of New York, in the court-house in the City and County of New York, and against the Hon. Theodoric R. Westbrook, the Justice presiding at said Special Term, and against Sidney P. Nichols, the relator in certain proceedings pending in said Special Term at Chambers.

79 N. Y. 582.

On reading and filing the affidavit of Edward Cooper, and the papers and proceedings thereto annexed, and the affidavit of William C. Whitney, and upon motion of Francis N. Bangs and Francis C. Barlow, of counsel for the said Edward Cooper, such mayor as aforesaid,

It is ordered by the court now here that the said respondents, the said Special Term at chambers, the Hon. Theodoric R. Westbrook, justice presiding thereat, and Sidney P. Nichols, do show cause before this court on Thursday, the 25th day of September, instant, at the court-house in the city and county of New York, at half-past ten o'clock, or as soon thereafter as counsel can be heard, why a writ of prohibition should not be issued by this court, under and pursuant to the statute, and according to the course and practice of the court, prohibiting and restraining the said Special Term, and the said justice, or any justice presiding thereat, from hearing and determining the questions arising upon the writ of *certiorari* mentioned in the said affidavit of Edward Cooper, and upon the certificate of the said Edward Cooper, filed as the return to said writ of *certiorari*, and from receiving, affirming, or reversing the proceedings of the said Edward Cooper, as mayor, therein mentioned, and from rendering any judgment thereon, and making any further order in respect thereto, and prohibiting and restraining the said Sidney P. Nichols from applying to said Special Term, for any hearing, or determination, or judgment on the said writ of *certiorari* and return thereto, and from carrying into execution or effect any such judgment, order, or determination. And it is further ordered that the said Special Term, and the said justice presiding thereat, and the said Sidney P. Nichols, be and they are each of them prohibited and restricted

 Art. 3. The Alternative Writ and Proceedings Thereon.

from any and all further proceedings in the matter of said *certiorari*, and from bringing the same to a hearing and trial, and from trying, deciding, or adjudicating the same in any manner or form, until the hearing before the General Term, under this order, and the decision of said General Term, upon such order, except that this order shall not operate to restrain or prevent either party from noticing or bringing to hearing before the General Term any appeal or appeals now pending from orders heretofore made in the said proceedings, or from noticing and putting the said proceeding on the calendar of the October Special Term, for the hearing and trial of issues of law or fact (of which short notice shall be sufficient) so that the same may be brought to a trial of hearing without delay, after the decision of this court upon this order, nor shall it operate to prevent the said Special Term at chambers from adjourning the motions now pending in said proceeding, from time to time, until the hearing and decision under this order.

HUBERT O. THOMPSON,
Clerk.

Precedent for Form of Alternative Writ of Prohibition by Appellate Division.

The People of the State of New York ex rel. EDWARD COOPER, Mayor of the City of New York, to the Special Term at Chambers, now being held in and for the City and County of New York, in the Court-House in said city, and HON. THEODORIC R. WESTBROOK, Justice, presiding at said Term at Chambers, and SIDNEY P. NICHOLS:

WHEREAS, Edward Cooper, lately in our Supreme Court, at a General Term thereof, held at the court-house in the city of New York on the 20th day of September, 1879, gave the court to understand, and be informed (here state facts briefly set out in affidavit or petition), as appears by the affidavits of William C. Whitney and Edward Cooper, verified September 20, 1879; and

WHEREAS, It appears by such affidavit that you, the said court at Special Term, you, the Hon. Theodoric R. Westbrook, the presiding justice thereof, are proceeding unjustly to aggrieve and oppress the relator, contrary to law and without jurisdiction, and that adequate and proper relief can only be had by the said Edward Cooper, mayor of the city of New York, by writ of prohibition restraining you and each of you from taking further proceedings in reference to the matters hereinbefore set forth, which relief is asked by the said relator:

We, therefore, do command you, the said Special Term, sitting at chambers, and you, the said presiding justice thereof, and you, Sidney P. Nichols, a party to the proceedings there sought to be had, to desist and refrain (here follow language of order) until the further order of this court thereon, and that you show cause before this court on Thursday, the 25th day of September next, at the court-house in the city and county of New York, why absolute writ of prohibition should not issue against you, and have you then and there this writ.

Art. 4. Proceedings on Return.

Witness, Hon. Noah Davis, presiding justice at said General
 L. S.] Term, at the court-house in the city of New York, this 20th
 day of September, 1879. HUBERT O THOMPSON,
 FRANCIS N. BANGS, Clerk.
Attorney for Relator.

Indorsed:—"Allowed by special order of the court September 20,
 1879. NOAH DAVIS,
"Presiding Justice."

A writ was held to be irregularly granted under the former practice, where the order to show cause was not served on the courts to which it was directed, and no appearance was made on their behalf. *Matter of Cameron*, 5 Hun, 290.

It will be remembered that it was held in proceedings by mandamus that an order to show cause took the place of and was equivalent to an alternative writ in the first instance.

Section 2095 provides that the writ of prohibition shall be served on the court or judge or party, as service is prescribed for the alternative writ of mandamus in § 2071 Code Civil Procedure. Decisions under the section last named as to service would doubtless be applicable to the writ of prohibition.

While § 2094 provides that "Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued until an alternative writ has been issued and duly served and the return day thereof has elapsed," yet it has been held that where there has been a hearing upon the merits upon an order to show cause why a writ of prohibition should not issue, that such order to show cause answers the purpose of an alternative writ issued in the first instance, and the granting of the peremptory writ is proper where upon such hearing only questions of law are involved. The court says, "No object could have served by issuing an alternative writ, as it appeared that only a question of law was involved, and a short cut was adopted to accomplish a just result." *People ex rel. Toy v. Mayer*, 71 Hun, 182, 53 St. Rep. 862, 24 Supp. 621.

ARTICLE IV.

PROCEEDINGS ON RETURN. §§ 2096, 2098, 2099.

§ 2096. [Am'd, 1895.] **Absolute writ issues, unless return made.**

Where the alternative writ has been duly served upon the court or judge, and upon the party, the relator is entitled to an absolute writ, unless a return is made by the

 Art. 4. Proceedings on Return.

court or judge, and by the party, according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be either delivered in open court, or filed in the office of the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. In default thereof, the judge, or the members of the court, may be punished, upon the application of the people or of the relator, for a contempt of the court issuing the writ. A return to an alternative writ of prohibition cannot be compelled in any other case.

L. 1895, ch. 946.

§ 2098. Return by party; proceedings when he adopts judge's return.

A return to an alternative writ, when made by a party, must be verified by his affidavit, as required for the verification of a pleading in a court of record; unless it consists only of objections to the legal sufficiency of the papers upon which the writ was granted. Where the party unites with the court or judge in a return, or annexes to the court's or the judge's return, an instrument in writing, subscribed by him, to the effect that he adopts it, and relies upon the matters therein contained, as sufficient cause why the court or judge should not be restrained, as mentioned in the writ, he is thenceforth deemed the sole defendant in the special proceeding; except that where a final order is made, awarding an absolute writ of prohibition, such a writ must be directed to the party, and also to the court or the judge.

§ 63, R. S., am'd. See § 2083.

§ 2099. [Am'd, 1895.] Proceedings after return; trial by jury.

Pleadings are not allowed upon a writ of prohibition. Where an alternative writ has been issued, the cause may be disposed of without further notice, at the term at which the writ is returnable. If it is not then disposed of, it may be brought to a hearing, upon notice, at a subsequent term. It must be heard at a term of the appellate division in the same judicial department, or at a Special Term held in the same judicial district, as the case may be. The relator may controvert, by affidavit, any allegation of new matter contained in the return. The court may direct the trial of any question of fact by a jury, in like manner and with like effect, as where an order is made for the trial, by a jury, of issues of fact, joined in an action triable by the court. Where such a direction is given, the proceedings must be the same, as upon the trial of issues so joined in an action.

The peremptory writ follows the general form of the alternative writ, except in final direction to show cause.

An order for an absolute writ of prohibition to an inferior court was reversed where the return showed that an order to show cause had been granted on affidavits, but did not show that there was any service on the courts and that they made no return and that there was no appearance for them. *In re Cameron*, 5 Hun, 290.

The writ of prohibition, like the writ of mandamus when issued from the appellate division to a Special Term or judge of the same court, may, in the discretion of the court, or where an

Art. 4. Proceedings on Return.

appeal is taken therein to the Court of Appeals in the discretion of that court, be preferred over any of the causes specified in § 791 of the Code. (See Code Civil Procedure, § 792.)

Precedent for Return to Alternative Writ by the Court Below.

(Title as above.)

To the Honorable the Supreme Court of the State of New York :

I, Zerah S. Westbrook, surrogate of the county of Montgomery, defendant herein, in answer to the writ of prohibition granted herein, March 21, 1881, a copy of which was served on me, and is hereto annexed, and for a return thereto, do hereby certify and return as by law required, as follows :

(Here insert facts.)

Therefore this defendant respectfully denies the right or jurisdiction of your honorable court to grant said writ or to continue the same, or in any way or manner interfere with or control the matters legally pending before him as surrogate, as aforesaid, and he respectfully denies the sufficiency of the papers and proofs on which the same was granted, and asserts that said writ was and is wholly unauthorized, useless and unnecessary.

All of which is respectfully submitted that your honorable court may consider and do as it may seem proper and just in the premises.

In witness whereof, I have hereunto set my hand and official
[L. s.] seal this 6th day of April, 1886, at Amsterdam, in the county
of Montgomery. Z. S. WESTBROOK,

Surrogate.

Return by Party to Alternative Writ.

(Title as above.)

The return of Jacob C. Nellis, to the writ of prohibition granted herein, a copy of which is hereto annexed, denies all and all manner of injury or grievance in said writ alleged, and certifies and returns to the Supreme Court (here state facts, or adopt return of court or judge if facts are stated therein).

Therefore, this defendant relies upon the matters hereinbefore set forth and in the return to said writ by the surrogate of Montgomery County as sufficient cause why the said surrogate's court should not be restrained as mentioned in said writ.

Witness my hand this 11th day of April, 1881.

JACOB C. NELLIS,

Executor, etc., of Peter G. Fox, deceased.

Add verification.)

Art. 4. Proceedings on Return.

Return by Justice of the Peace.

SUPREME COURT.

People *ex rel.* Frederick Hess,

agst.

A. B. Flansburgh, a justice of the peace, etc.,
and Horace Inman.

} 74 Hun, 130.

To the Honorable the Supreme Court of the State of New York :

I, A. B. Flansburgh, a justice of the peace, defendant herein, in answer to the writ of prohibition granted herein, January 24th, 1893, a copy of which was served upon me and is hereto annexed, and for a return thereto, do hereby serve and as by law required, as follows :

On the 20th day of January, 1893, H. B. Waldron, of the City of Amsterdam, called at my office and requested me to issue a summons in an action wherein Horace Inman was the plaintiff and Frederick Hess was defendant. I thereupon did issue a summons, a copy of which is annexed to the petition of Frederick A. Hess herein, and delivered said summons and a copy thereof to said H. B. Waldron.

That this defendant heard nothing further from said summons, except that the summons was returned served, until the 25th day of January, 1893, when the writ of prohibition was served upon him. That he has no knowledge or information of the matters set forth in the petition and affidavits on which the writ was granted. That at the time said summons was issued this defendant was not aware that Frederick Hess was not a resident of Montgomery County and did not know that he was in Montgomery County attending court. That said Frederick Hess was not exempt from the service of the summons upon him, and that this defendant as such justice of the peace had jurisdiction of the subject-matter of said action and of the said Frederick Hess upon the service of the summons upon him. That the fact that the said Frederick Hess was in Montgomery County for the sole purpose of attending court, wherein he was a party and a witness, did not exempt him from the service of a summons upon him.

Therefore, this defendant denies the right or jurisdiction of your honorable court to grant said writ and to continue the same, or in any way or manner interfere with or control the matter legally pending before him as justice of the peace as aforesaid, and he respectfully denies the sufficiency of the papers and proof on which the same is granted, and asserts that the said writ was and is wholly injurious, useless and unnecessary, and that the relator's remedy was by motion to set aside service of the summons.

All of which is respectfully submitted that your honorable court may consider and do as it may deem proper and just in the premises.

In witness whereof I have hereunto set my hand this day of February, 1893, at Amsterdam, in the county of Montgomery.

A. B. FLANSBURGH,
Justice of the Peace.

Art. 4. Proceedings on Return.

Return to Writ of Prohibition by Board of Supervisors.

SUPREME COURT.

People *ex rel.* towns of Blenheim, Gilboa, etc.,
and of Alonzo Parslow, a taxpayer and
supervisor of the town of Blenheim.

agst.

The Board of Supervisors of the County of
Schoharie.

121 N. Y. 345.

To the Honorable the Supreme Court of the State of New York:

The Board of Supervisors of the county of Schoharie, defendant herein, by Menzo Young, the chairman of said board, and by virtue of a resolution of said board authorizing him to do so, in answer to the writ of prohibition granted herein on the 30th day of November, 1887, a copy of which was served upon said board, by service thereof on said chairman, on the first day of December, 1887, and is hereto annexed, and for a return thereto for said board, under a resolution thereof directing him so to do, hereby certifies and returns as by law required as follows, to wit:

That ever since the first day of January, 1882, the indigent insane and the pauper insane from and residing in and having a legal settlement in the different towns of the county of Schoharie, as well as said insane from the county of Schoharie, and for many years prior thereto, have been duly supported and maintained by and at the expense of the said county of Schoharie, in the State of New York, in the New York State Lunatic Asylum at Utica, the Willard Asylum at Ovid, and the Binghamton Asylum at Binghamton in the following manner, to wit:

The said Board of Supervisors at their annual session in each year received from the officers of each of said asylums an estimate of the probable expense of clothing and maintaining all of the insane patients from said county and towns therein in each of said asylums, respectively, for the ensuing year; the said board annually levy or raise in each year the amount of each of the said estimates by levying the same upon and collecting the same out of the taxable property of said county, and causing the same to be paid into the county treasurer of said county, and which said sums levied and collected and paid as aforesaid where such sums as would probably cover the estimate of each of the said asylums for the expense of clothing and maintaining said patients therein and in each one thereof for one year in advance.

That out of such moneys so raised and paid into the county treasurer, said county paid each year to the treasurer of each of said asylums, the bills for such clothing and maintenance as they became due and payable according to the by-laws of each of said asylums upon the order of the steward of each one thereof. That each of the said bills so paid by the county treasurer, as aforesaid, contained an itemized statement of the expense for clothing and maintenance of each of said patients in

Art. 4. Proceedings on Return.

each of said asylums respectively. That if said probable amounts so raised by said county and paid into the county treasurer thereof were insufficient to pay said bills upon the orders of said stewards as aforesaid, such discrepancy was paid by the county treasurer out of and from the contingent fund and from moneys in his hands belonging to said county; and if more than sufficient for such purposes such excess remained in and became part of the contingent funds in his hands, belonging to said county.

That at the annual session of said board in each year, said county treasurer presented his report to said board, containing a statement of all moneys received and paid out by him for the year, including the amount of money so paid out by him upon the orders of the stewards of such asylums as aforesaid, and said report of said county treasurer was each year received and filed by said board, and the account of all moneys so received and paid out by him was duly passed by said board.

That in no other way or manner, or by any other acts, resolutions, or directions of said board has said board authorized the payment of said clothing and maintenance of said insane by said county.

That as said board is informed and believes true, such payment by said county in no way or manner was the same as county charges so as to preclude said board from charging the same upon the towns in said county legally liable therefor and chargeable therewith.

That during all the period aforesaid the distinction between town and county poor has existed in the county of Schoharie, and still does exist, and each town is, and during all the period aforesaid has been, liable for the support of all its own poor. That during the period of time since January 1st, 1882, different towns in the county of Schoharie, and particularly the town mentioned in the title of said writ, have duly had indigent and pauper insane clothed and maintained in some one or all of the asylums who were residents of said towns, and had a legal settlement therein, who were duly and legally sent to said asylums and received therein upon an order of some court or officer, for which said town was and is chargeable, and the expense for the clothing and maintenance of which in said asylums has been defrayed and paid by the county of Schoharie as aforesaid; but the towns therein did not have the same number of such insane in said asylums, nor for the same length of time, nor at the same expense for clothing and maintenance.

That none of the towns in said county has in any way or manner paid any of the expense of clothing or maintaining any lunatic in any of the said asylums from any town, save as the same has been paid by the county of Schoharie as herein before stated.

That at the annual session of said board on the 26th day of November, 1887, the said board duly passed and adopted a preamble and resolution, of which the following is a copy: (insert resolution to the effect that each town must be liable for the support of its poor, etc.)

Upon information and belief said board of supervisors further return that they had a legal right to pass said resolution; that it was not in excess of their power, and that the same properly carried out would lawfully and justly charge the payment of the expense of clothing and

 Art. 5. The Absolute Writ. When Granted.

maintenance upon the towns legally liable therefor and chargeable therewith; and that said action under said resolution would charge every and any of the towns named in the title of said writ with the amounts named in the affidavit of the relator, or with any other amount, the same would be a just and lawful charge against said town or towns.

And said board further return that they were proceeding to carry out said resolution according to its terms, at the time said writ was served upon its chairman as aforesaid, and upon the same being served as aforesaid, the said board immediately obeyed said writ, and refrained from further action under said resolution, although said writ was not directed to said board, or to any member thereof, and which legal objection the said board does not waive, but which said objection is now taken hereby to said writ.

Therefore said board of supervisors respectfully denies the right, jurisdiction, or authority of your honorable court to grant said writ, or to continue the same, or in any way or manner interfere with the control of matters legally pending before said board as aforesaid; and said board respectfully denies the sufficiency of the papers and process upon which the same was granted, and the legal right of the person making the affidavit for said writ to make the same, or to become the relator therein either for himself or for the town of Blenheim, or for either or any or all of the other towns named in the title of said writ, and asserts that said writ is and was wholly unauthorized, useless, and unnecessary. All of which is respectfully returned and submitted, that your honorable court may consider it and do as it may deem proper and just in the premises.

In witness whereof I have hereunto subscribed the name of the board of supervisors of the county of Schoharie, by myself as chairman thereon, under a resolution of said board authorizing me to do so this 10th day of December, 1887, at Schoharie, in the county of Schoharie.

(Signed) THE BOARD OF SUPERVISORS OF THE
COUNTY OF SCHOHARIE.

By MENZO YOUNG,

(Add verification.)

Chairman of said Board.

ARTICLE. V.

THE ABSOLUTE WRIT. WHEN GRANTED. §§ 2096 in part, 2100.

§ 2096. Absolute writ issues, unless return made.

Where the alternative writ has been duly served upon the court, or judge, and upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge, and by the party according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. . . .

§ 2100. Final order; costs.

Where a final order is made in favor of the relator, it must award an absolute writ of prohibition; and it may also direct that all proceedings or any specified proceeding,

 Art. 5. The Absolute Writ. When Granted.

theretofore taken in the action, special proceeding, or matter, as to which the prohibition absolute issues, be vacated and annulled. The writ of consultation is abolished. Where a final order is made against the relator, it must authorize the court or judge, and the adverse party, to proceed in the action, special proceeding, or matter, as if the alternative writ had not been issued. Costs, not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.

The provision as to amending or vacating proceedings had, applies only to interlocutory and mesne proceedings prior to the final proceedings. *People ex rel. Commissioners of Excise*, 61 How. 514, 1 Civ. Pro. 244.

Precedent for Final Order for Writ.

At an extraordinary General Term of the Supreme Court, held at the court-house in the city of New York, on the 29th day of September, 1879 :

Present :—Hon. Noah Davis, *Presiding Justice* ; Hon. John R. Brady and Hon. George C. Barrett, *Justices*.

The People *ex rel.* The Mayor of New York,

agst.

Sidney P. Nichols and others.

} 79 N. Y. 582.

The order to show cause, made in this matter on the 20th day of September, 1879, having come on to be heard before the said justices now present, at an extraordinary General Term, held at the court-house aforesaid, on the 25th day of September, 1879, upon the papers on which the same was granted, and Mr. Thomas G. Evans having appeared for Mr. Justice Westbrook, and shown cause by reading and filing a statement of facts made by Mr. Justice Westbrook ; and Messrs. Townsend and Weed having appeared for Sidney P. Nichols, and shown cause by reading and filing the affidavit of John W. Weed ; and Mr. Francis N. Bangs having been heard for the mayor of the city of New York ; and Mr. William Allen Butler for Sidney P. Nichols, and due deliberation having been thereupon had :

It is ordered, that there do issue out of this court, and under the seal thereof, a writ of prohibition in the usual form, addressed to the said Sidney P. Nichols, and to the Special Term and terms appointed to be held at the court-house in the city and county of New York, for non-enumerated motions and chamber business, and the justice and justices presiding thereat, restraining and prohibiting the said Special Term and the said justice and justices from proceeding to entertain or determine any motion or application for any judgment or order reversing, setting aside, or in any manner affecting any of the proceedings of the mayor of the city of New York, in or upon or toward the removal of said Sidney P. Nichols from the office of commissioner of police of the police department of the city of New York, upon or in pursuance of the writ of *certiorari* heretofore

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issued out of this court to said mayor, and the return thereto, or either of them, and prohibiting and restraining the said Sidney P. Nichols from moving at or applying to any such Special Term, at chambers, for any such judgment or order of reversal, or of any other judgment or order upon said writ and *certiorari*, or either of them.

[L. s.]

HUBERT O. THOMPSON,
*Clerk.***Precedent for Form of Order Denying Writ.**

(89 N. Y. 152.)

At a Special Term of the Supreme Court, held at the chambers of
Hon. Joseph Potter, in Whitehall, on the 18th day of April, 1886 :
Present—Hon. Joseph Potter, *Justice*.

The People *ex rel.* Henry C. Adams,*agst.*Zerah S. Westbrook, Surrogate, etc., and Jacob
C. Nellis, Executor of, etc., of Peter G. Fox,
deceased.

The defendants having by their counsel appeared when the writ of prohibition was returnable, and filed their separate return thereto, and the relator having also appeared and moved for and obtained a postponement of the hearing of the matter until this time against the objection of the defendants, and having read and filed, and duly considered the affidavit and papers upon which said writ was granted, and the said returns thereto :

Now, after hearing the arguments of the said Henry C. Adams, the relator in person, in support of the application, and of J. E. Dewey, of counsel for the said defendants, in opposition :

It is ordered and adjudged, that the relator is not entitled to a writ of prohibition absolute, and that his application therefor, and such writ be, and the same is, hereby denied. And the said surrogate and the said executor are hereby authorized to proceed in the said matter or proceeding pending in or before said surrogate's court, and referred to in the alternative writ, the same as if such writ had not been issued.

Also, that the said relator, Henry C. Adams, pay to the defendant, Jacob C. Nellis, executor, etc., as aforesaid, and the said Zerah S. Westbrook, surrogate, etc., as aforesaid, or to their counsel, J. E. Dewey, Esq., \$50, costs and disbursements of opposing said application.

Also, that the papers upon which said alternative writ was issued, and the said writ, and the said returns thereto, be filed, and this order or adjudication be filed and entered in the office of the clerk of Montgomery County.

JOS. POTTER,
Justice Supreme Court.

Art. 5. The Absolute Writ. When Granted.

Final Order Granting Writ. (74 Hun, 130.)

The People of the State of New York on the relation of FREDERICK HESS,
to A. B. FLANSBURGH, *Justice of the Peace, etc., and to* HORACE
INMAN, *greeting :*

WHEREAS, Frederick Hess of the town of Long Lake in the county of Hamilton, State of New York, did present to the Supreme Court of the said State of New York, on the 24th day of January, 1893, the fact upon petition and affidavit, and the papers accompanying the same, that on or about the 3d day of November, 1892, Horace Inman, who resides in the city of Amsterdam in the county of Montgomery, said State, commenced an action in the Supreme Court of said State, as sole plaintiff against Hess as sole defendant, laying and making the place of trial in said Montgomery County, said action having been commenced by the personal service of a summons upon said defendant at his residence in said town of Long Lake. That issue was duly joined in said action and that the said cause was duly noticed for trial and duly placed on the calendar of and for the January, 1893, term of the Circuit Court, held in Montgomery County by both said plaintiff and said defendant.

That on Friday, January 20th, 1893, the said cause was duly called in its order for trial at the said Circuit Court, his Honor Justice Stover presiding, and the trial of the same was duly moved by the said defendant, through his attorney; that said plaintiff Inman through his attorney and counsel announced that he was not ready for trial by reason of the fact of the plaintiff's absence, and that they could not safely proceed to trial without him, and that he was a material witness in his own behalf; whereupon on motion of said defendant Hess the complaint in said action was dismissed and an order to that effect entered in the minutes of the clerk of said court, but that no other or formal order and no judgment have or has been entered in said cause.

That immediately after the direction of the court dismissing the complaint, and in the actual and constructive presence of the court, the said Frederick Hess was served with a summons emanating from a court of a justice of the peace, issued by A. B. Flansburgh, a justice of the peace in and for Montgomery, N. Y., commanding the said Frederick Hess to appear before the said A. B. Flansburgh, as said justice on the 27th day of January, 1893, at one o'clock in the forenoon of that day, at his office, No. 33 East Main Street, in said city of Amsterdam, to answer the complaint of the said Horace Inman, in an action in which Horace Inman was the sole plaintiff and Frederick Hess was the sole defendant, the cause of action being identically the same as the said action against the said Hess in the Supreme Court hereinbefore mentioned and described, the said action in the Supreme Court being still pending and undetermined.

That said Frederick Hess, the relator herein, residing in the town of Long Lake as aforesaid, in the county of Hamilton, State of New York, and outside of the jurisdiction of the said justice of the peace, and of his said court, attended and was present at the said term of the said Circuit Court solely as a party and as a witness in his own

 Art. 5. The Absolute Writ. When Granted.

behalf, and for no other reason or purpose whatsoever; and that the said Frederick Hess was brought within the jurisdiction of the said justice of the peace by and in consequence of his attendance at said Circuit Court, and that the said justice would have had no jurisdiction over the person of the said defendant Hess had he not been brought within the said county of Montgomery by and through his attendance as aforesaid on said Circuit Court.

Wherefore said Frederick Hess has prayed relief of our said court, and our writ of prohibition in that behalf.

We, therefore, having determined that the said Frederick Hess is entitled to the said writ of prohibition and to the said relief prayed for, do hereby command you, and each of you, that you absolutely desist and refrain from any and all further proceedings in a certain action commenced in said court of said justice of the peace on the 20th day of January, 1893, by said Horace Inman, as plaintiff, against said Frederick Hess, as defendant, and now pending in said justices' court; and that all proceedings heretofore taken in the said action in the justices' court before said A. B. Flansburgh, as said justice, be and the same are hereby vacated and annulled.

Witness, Hon. M. L. Stover, one of the justices of the Supreme Court at the court-house in the county of Montgomery this 28th day of February, 1893.

JOHN F. COLLINS,
Deputy Clerk.

Order for Peremptory Writ.

At a Special Term of the Supreme Court held at the court-house in the county of Kings on the 30th day of August, 1895.

Present:—Hon. Wm. J. Gaynor, *Justice.*

People *ex rel.* Edward Sprague *et al.*,
Administrators, etc.,

agst.

Thomas W. Fitzgerald, District Attorney, and
Acting Surrogate of the County of Richmond,
and Mary L. Englebrecht.

15 App. Div. 531.

The alternative writ of prohibition in this matter, made on the 23d day of August, 1895, and returnable on the 27th day of August, 1895, having been duly personally served upon the respondents, Thomas W. Fitzgerald and Mary L. Englebrecht, as appears by the certificate of the sheriff of the county of Richmond, and said writ having come on to be heard before Hon. Wm. J. Gaynor, justice of the Supreme Court, at a Special Term held in the court-house in the county of Kings as aforesaid, on the 27th day of August, 1895, upon the papers upon which the same was granted, and Calvin D. Van Name, Esq., having appeared for said respondents, Thomas W. Fitzgerald and Mary L. Englebrecht, and having filed the affidavit of Mary L.

 Art. 5. The Absolute Writ. When Granted.

Englebrecht in opposition thereto, verified August 26th, 1895, and no other affidavit or return being filed or made to said writ, after hearing George J. Greenfield, Esq., attorney for the relators, and the said Calvin D. Van Name, Esq., attorney for the respondents, and due deliberation being had; it is

Ordered, that said writ of prohibition be made absolute and that there do issue out of this court and under the seal thereof a writ of prohibition in the usual form addressed to Thomas W. Fitzgerald, district attorney and acting surrogate of the county of Richmond, and to Mary L. Englebrecht, restraining and prohibiting the said acting surrogate from taking any proceedings under the decree made and entered by him in the surrogate's court of Richmond County on the 17th day of August, 1895, for the removal of said Edward Sprague and Abigail Journeay, administrators of David H. Journeay, deceased, or either of them, or for the appointment of Mary L. Englebrecht, or any other person, as administratrix or administrator in their place, or from taking any proceeding whatever for the enforcement of said decree in that behalf, and prohibiting and restraining the said Mary L. Englebrecht from carrying into effect or proceeding upon the said decree in that behalf; and it is also further

Ordered and adjudged that the said Mary L. Englebrecht pay to the relators, or their counsel, George T. Greenfield, Esq., ten dollars costs and disbursements awarded to the said relator in this proceeding.

Enter: W. J. G.

Granted August 30th, 1895.

H. C. SAFFEN,
Clerk.

Peremptory Writ of Prohibition. (15 App. Div. 531.)

The People of the State of New York to THOMAS W. FITZGERALD, district attorney and acting surrogate of the county of Richmond, in said State, and to MARY L. ENGLEBRECHT, greeting:

WHEREAS, on the 23d day of August, 1895, an alternative writ of prohibition was duly issued out of this Supreme Court upon the application of Edward Sprague and Abigail Journeay, administrators of David H. Journeay, deceased, and to Abigail Journeay, individually, prohibiting and restraining the said Thomas W. Fitzgerald and Mary L. Englebrecht from taking any proceedings under a certain decree made and entered by the said Thomas W. Fitzgerald, as acting surrogate of the county of Richmond, on the 17th day of August, 1895, for the removal of Edward Sprague and Abigail Journeay as administrators of the said David H. Journeay, deceased, or either of them, or for the appointment of Mary L. Englebrecht, or any other person as administratrix or administrator in their place, or for the enforcement of said decree in that behalf until the further direction of the court, which said alternative writ of prohibition was made returnable on the 27th day of August, 1895, at a Special Term of the Supreme Court, held at the court-house of the county of Kings on that day; and

WHEREAS, the said alternative writ of prohibition was duly person-

 Art. 6. Quashing the Writ, Stay of Proceedings and Appeal.

ally served upon the said Thomas W. Fitzgerald and Abigail Journeay, and upon the return day thereof the said respondents appeared by Calvin D. Van Name, Esq., their attorney, in opposition thereto, and the said Mary L. Englebrecht having filed an affidavit in answer thereto, and no other answer or return being made to said writ, and after hearing the respective counsel of the said parties, and due deliberation being had, it was ordered that the said writ be made absolute, and that there issue out of this court under the seal thereof a writ of prohibition in the usual form addressed to the said respondents above named ;

We, therefore, being willing that the laws and customs of our State should be observed, and that our citizens should in no wise be oppressed, do command you that you desist and refrain from taking any proceeding under the said decree made and entered by you, Thomas W. Fitzgerald, in the surrogate's court of the county of Richmond on the 17th day of August, 1895, as acting surrogate, for the removal of said Edward Sprague and Abigail Journeay, administrators of the estate of David H. Journeay, or either of them, or for the appointment of Mary L. Englebrecht, or any other person, as administratrix or administrator in their place, or for the enforcement of said decree in that behalf; and that you, Mary L. Englebrecht, desist and refrain from carrying into effect or proceeding upon the said decree in that behalf.

Witness, Hon. Wm. J. Gaynor, one of the justices of the Supreme Court at the court-house in the county of Kings the 4th day of September, 1895.

By the court.

JOHN H. ELSWORTH,
Clerk.

Indorsed :—" The within writ of prohibition allowed this 4th day of September, 1895.

"WM. J. GAYNOR,
"Justice Supreme Court."

ARTICLE VI.

QUASHING THE WRIT, STAY OF PROCEEDINGS AND APPEAL.

§§ 2097, 2101, 2102.

§ 2097. Legal objections; how taken; motion to quash or set aside writ.

An alternative writ of prohibition cannot be quashed or set aside, upon motion, for any matter involving the merits. An objection to the legal sufficiency of the papers upon which the writ was granted, may be taken in the return. A motion to quash an absolute writ of prohibition, or to set aside an alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted.

§ 2101. [Am'd, 1895.] Appeal.

A final order, made as prescribed in the last section, can be reviewed only by appeal. Where the order was made by the appellate division, the execution of the order appealed from shall not be stayed, except by an order made at a term of the ap-

Art. 6. Quashing the Writ, Stay of Proceedings and Appeal.

pellate division in the same department upon such terms* as to security, or otherwise, as justice requires.

See L. 1873, ch. 70, § 3; also, § 2087; L. 1895, ch. 946.

§ 2102. [Am'd, 1895.] Stay of proceedings; enlargement of time.

The proceedings upon a writ of prohibition, granted at a Special Term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by the judge of the court, but not by any other officer. Where the writ was granted at a term of the appellate division, an order staying the proceedings, or enlarging the time to make a return, can be made only by a justice of the appellate division of the judicial department within which the writ is returnable; and where notice has been given of an application for a prohibition at a term of the appellate division, or an order has been made to show cause at such term, why a prohibition should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

A writ of prohibition not being demandable of right, but resting in sound judicial discretion, an order denying is it not reviewable in the Court of Appeals. *People ex rel. v. Westbrook*, 89 N. Y. 152.

* So in the original.

CHAPTER VII.

THE WRIT OF ASSESSMENT OF DAMAGES.

The provisions of article 6 of title 2 of chapter 16 relate to the assessment of damages of property taken by the State for the use of the people of the State. The article is a re-enactment of a portion of the Revised Statutes (3 R. S., 5th ed., 501; 2 Edm. 610, 612) materially amended as to the details of the proceedings. The commissioners say that no substantial changes have been made in the scheme of the statute, except as to what is now enacted as § 2111; as to this, the codifiers state that the former statute required the jury on inquisition to find upon several questions upon which there might be conflict of evidence, and very nice points of law might arise; while it provided no adequate machinery for the determination of these questions, and that the amendments contemplate the restriction of the jury entirely to the question of value. The fact that this proceeding is always taken by the attorney-general on behalf of the State, that it is exceedingly unusual, and that its details concern only the office of the attorney-general, where precedents are at hand, seem to render it unnecessary to incumber this book with forms which must necessarily be obtained from that office, and which would be of no use to any other practitioner. The same consideration seems to render it superfluous to reprint the sections of the Code on that subject, from 2103 to 2119 inclusive, and hence they are omitted. The single reported case on the subject under the Revised Statutes is *United States v. Dumplin Island*, 1 Barb. 24, which relates to the practice as it then stood.

CHAPTER VIII.

WRIT OF CERTIORARI.*

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* See on this subject *Encyclopædia of Practice and Pleading*; *Harris on Certiorari*. *Certiorari* to Review Assessments is treated under "Proceedings under the Tax Law."

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ARTICLE I.

OFFICE OF WRIT OF CERTIORARI.

It is said by a recent text writer that the office of the writ of *certiorari* is to correct errors of a judicial character by inferior courts, and errors in the determination of special tribunals, commissioners, magistrates, and officers exercising judicial powers affecting the property or right of citizens, and who act in a summary way, or in a new way not known to the common law, and also the proceedings of municipal corporations in certain cases. Wood on Mandamus, 194. The writ of *certiorari* has, under the practice, been known as a common-law *certiorari*, and *certiorari* by statute. The former is defined in Bacon's Abridgment, title Certiorari, as a writ issuing out of Chancery or the King's Bench, directed to the judges or officers of inferior courts or tribunals, commanding them to return the records of a cause or proceeding pending before them. It also, according to Tidd's Practice, 1138, comprehends the determination of special tribunals, magistrates, officers, and of municipal corporations in certain cases. It brought up the record either for the purpose of examining into the legality of the proceedings, or annulling or quashing an order or judgment of such inferior court, given in a matter over which the court had no jurisdiction, or for the purpose of giving a defendant sued in such inferior court surer and more certain justice before a higher tribunal. Addison on Torts, 1042.

The statutory writ, as its title implies, issues under a statute authorizing the granting of the remedy, and previous to the Code of Civil Procedure such statutes, to a greater or less extent, prescribed the forms and methods to be followed in laying down the

Art. I. Office of Writ of Certiorari.

rules governing its operation. The common-law writ had its scope and character clearly defined by a long line of authorities, showing the occasions upon which it would be granted, and a distinct and well-defined practice had grown up with its administration. Most of these rules were followed in practice under the statutory writ, and they have formed the basis for the present regulation found in the Code. It is said in *People v. Van Alstyne*, 32 Barb. 131, that "sometimes the writ is expressly authorized, and its limits defined by statute, and then, of course, the nature and extent of the powers and the cases in which it is to be exercised depend mainly, if not entirely, on the provisions of the statute; sometimes there is no statutory regulation on the subject, and then the writ is denominated a common-law *certiorari*." The common-law writ was much more usual in practice, although there were a number of statutes prior to the Repealing Act. But no statute had defined the general use and character of the writ which is, by the present section, only restricted to the two general classes described as common law and statutory. The practice had, aside from exceptional cases under the statutory writ, never been codified, and was the outcome of common-law procedure, and regulated by the decisions of the courts. Since there is in the present section no attempt to define with more particularity than above stated the cases in which the writ is allowed to issue, the following quotation is made from the note of the revisers in their report of the article, in form substantially as at present, to the legislature :

"1. A court of general jurisdiction may, in its discretion, upon the application of any party, to or in certain illy defined cases, a person interested in a suit or proceeding before any inferior court, tribunal, board, officer, or other person, vested by law with an authority judicial in its nature (*Easton v. Calendar*, 11 Wend. 90; *Matter of Mt. Morris Square*, 2 Hill, 14; *People v. Van Alstyne*, 32 Barb. 131; *People v. Board of Health*, 33 id. 344; S. C. 12 Abb. Pr. 88; *People v. Supervisors of Livingston*, 43 Barb. 232); and, perhaps, also where the power is ministerial in its nature, but necessarily connected with judicial authority (*People v. Hill*, 7 Alb. L. J. 220), issue a writ of *certiorari* to review any final determination, judicial in its nature, made in such proceeding, by such authority (or, under color thereof, *Fitch v. Kirkland Commissioners*, 22 Wend. 132; *People v. Suffolk Judges*, 24 id. 249); where the applicant cannot be adequately relieved in any other way. *Peo-*

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ple v. Supervisors of Queens, 1 Hill, 195; *People v. Board of Health*, 33 Barb. 344; 12 Abb. Pr. 88; *People v. Overseers, etc.*, 44 Barb. 467.

"2. A court of general jurisdiction may, in its discretion, upon the application of any party to a proceeding before it, or of its own motion, issue the writ to procure, from any such inferior authority, information which the latter has, and which is necessary or convenient for the purposes of justice in the course of the proceedings in the higher court. 2 R. S. 599, part 3, chap. 9, title 3, § 45 (2 Edm. 621); *Graham v. People*, 6 Lans. 149; *Kanouse v. Martin*, 3 Sandf. 593; *People v. Cancemi*, 7 Abb. Pr. 271; *Sweet v. Overseers of Clinton*, 3 Johns. 23.

"3. The common-law remedy, as thus defined, is not taken away, in the absence of express words to that effect, either by a provision of the statute that the determination of the inferior tribunal is final (*Le Roy v. Mayor, etc.*, 20 Johns. 430; *Ex parte Mayor, etc.*, 23 Wend. 277; *People v. Freeman*, 3 Lans. 148), or by a provision in a statute giving a special writ. *Comstock v. Porter*, 5 Wend. 98; *Kellogg v. Church*, 3 Denio, 228. In the latter case the two remedies are concurrent."

This citation, with the authorities, is, perhaps, as explicit a statement as can be made of the principles regulating the issue of this writ. Previous to the Code of Civil Procedure the common-law writ had been much used to bring up matters for a review from inferior courts, which were there provided for by appeal, and the restrictions as to the use of the writ will be found enacted here.

Certiorari is not a writ of right, therefore the action of the legislature in taking away the right to the writ is not in violation of the New York Constitution, article 6, § 6, providing for the Supreme Court with general jurisdiction in law and equity. *People ex rel. v. Board of Supervisors*, 49 Hun, 476, 2 Supp. 555.

The rule of the common-law which treated the writ of *certiorari* as analogous to a writ of error has no application to the present statutory proceeding under which, by § 2121, Code Civil Procedure, the writ of *certiorari* cannot issue to review a determination in a civil action or special proceeding by a court of record, or a judge of a court of record. *Beardslee v. Dolge*, 143 N. Y. 166, 62 St. Rep. 187.

 Art. 2. When the Writ Issues, and to What Body or Officer.

ARTICLE II.

WHEN THE WRIT ISSUES, AND TO WHAT BODY OR OFFICER.

§§ 2120, 2121, 2122, 2146.

§ 2120. Cases where writ may issue.

The writ of *certiorari* regulated in this article, except the writ specified in § 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only :

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.
2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.

§ 2121. Cases where it cannot issue.

A writ of *certiorari* cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record or a judge of a court of record.

See §§ 1356 and 1357, also § 2.

§ 2122. The same.

Except as otherwise expressly prescribed by a statute, a writ of *certiorari* cannot be issued, in either of the following cases :

1. To review a determination, which does not finally determine the rights of the parties with respect to the matter to be reviewed.
2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer.
3. Where the body or officer, making the determination, is expressly authorized, by statute, to rehear the matter, upon the relator's application ; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

§ 2146. "Body or officer" ; "determination" ; what they include.

The expression, "body or officer," as used in this article, includes every court tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of *certiorari* ; and the word, "determination," as used in this article, includes every judgment, order, decision, adjudication, or other act of such a body or officer, which is subject to be so reviewed.

The writ is a discretionary one, and the court has power to grant or withhold it. It cannot be demanded as a matter of right, and it lies in the sound discretion of the court whether to grant or withhold it, and it is the duty of the court to examine the matter and determine whether justice requires its allowance. This is so well settled and so strictly followed that the Court of Appeals, when a writ is quashed at General Term, refuses to entertain an appeal, holding it is a matter of discretion in the court below, unless the order appealed from states that it was refused for want of power in

 Art. 2. When the Writ Issues, and to What Body or Officer.

the court to grant it. *People ex rel. Mayor v. McCarthy*, 102 N. Y. 642. It is said in *People ex rel. Smith v. Commissioners, etc.*, 3 St. Rep. 615, 103 N. Y. 370: "An order which simply quashes a common-law *certiorari* has often been held not appealable to this court, because the issuing of the writ rests in the discretion of the court, and consequently it can, in its discretion, recall or quash the writ without passing on the validity of the proceeding sought to be reviewed." The authorities are numerous and uniform on this point in this State, although a different rule has been held in England, and also in Massachusetts. *People v. Peabody*, 26 Barb. 437; *People v. Board of Health*, 33 id. 344; *People v. City of Rochester*, 21 id. 656; *Matter of Eightieth Street*, 17 Abb. 324; *People v. Common Council of Utica*, 45 How. 289; *People v. Andrews*, 52 N. Y. 445; *People v. Hill*, 53 id. 547. The court must be satisfied that the writ is necessary to prevent injustice to the applicant, and that it would be beneficial to him and not detrimental to the public welfare. *People v. Mayor*, 5 Barb. 43. Nor will it lie where there is another adequate remedy. The writ is only to be resorted to in case where an appeal or other appropriate and proper remedy is not available, and should not be resorted to unless necessary to obtain a review in cases where no other provision therefor is made by law. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Covert*, id. 674; *People v. Morgan*, 65 Barb. 473; *People v. Overseers of Berne*, 44 id. 467; *People v. Board of Health*, 33 id. 344. The writ lies only to review acts judicial in their nature, and will not be granted to review mere ministerial acts. *People v. Mayor*, 5 Barb. 43; *People v. Hill*, 65 id. 170; *People v. Vanslyck*, 4 Cow. 297; *Pugsley v. Anderson*, 3 Wend. 468; *People v. Mayor*, 2 Hill, 9; *Matter of Mount Morris Square*, id. 14. And in such cases where there was a judicial discretion to be exercised by the inferior tribunal, the writ should be refused. *Lawton v. Commissioners of Cambridge*, 2 Caines, 179. The present Code does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion. *People ex rel. v. Fire Commissioners*, 100 N. Y. 82. It corrects errors of a judicial not of a ministerial nature, even though the body exceeds its powers, and the same is true as to legislative acts. *People v. Board of Health*, 33 Barb. 344. Where *certiorari* is the only relief, and justice cannot be done without having the return of a ministerial officer in the same

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matter before the court, he should be compelled to make a return. *People v. Hill*, 65 Barb. 170. But the writ will not issue to a purely ministerial officer to review his action. *People v. Waller*, 68 N. Y. 403. Nor does it lie to a ministerial officer to examine process under which he acts or his title to office. *People v. Supervisors of Queens*, 1 Hill, 195. The writ has been refused to review the proceedings of persons who are not officers, though they have assumed to act as such. If they are officers *de facto* their acts are valid. If they are not such, then their acts are void. *People v. Covert*, 1 Hill, 674. Title to office will not be inquired into by the writ. *Coyle v. Sherwood*, 1 Hun, 272. The writ does not lie until after final adjudication by the inferior tribunal. *Lynde v. Noble*, 20 Johns. 80; *Derlin v. Platt*, 11 Abb. 398; *Matter of Hamilton*, 58 How. 290. And in forcible entry and detainer it was refused until after final inquisition found. *Hains v. Wendell*, 4 Wend. 213; *People v. Covill*, 10 Week. Dig. 90. *Certiorari* does not issue to officers or bodies exercising judicial functions till the proceedings below are completed and a final determination had. A tax cannot be reviewed before the assessment roll is adopted or warrant signed. *People v. Trustees of Palmyra*, 3 Hun, 549.

It was said in an early case in this State, that wherever the rights of an individual are infringed by the acts of persons clothed with authority to act, and who exercise that power illegally and to the injury of an individual, the person injured may have redress by *certiorari*. *Wildy v. Washburn*, 16 Johns. 49. This is now, of course, subject to the qualification that no appeal is allowed by law in such case. It is also said that the writ runs not only to courts, but to persons invested with authority to decide on the property or rights of citizens, even where, by statute, they are finally to hear and determine if right to the writ is not expressly taken away. *People v. Freeman*, 3 Lans. 148; *Leroy v. The Mayor*, 20 Johns. 429; *Bradhurst v. Turnpike Co.*, 16 id. 8; *Ex parte Mayor of Albany*, 23 Wend. 277. That such a provision in a statute is a bar to the writ is held in *People v. Betts*, 55 N. Y. 600, a leading case on the subject.

It was also said before the present Code as to the province of the writ, that it was to bring up the record or proceedings of an inferior court or tribunal, to enable the reviewing court to decide whether it had acted within its jurisdiction. This has in some cases been extended to the correction of errors, but it is only

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allowable where there is no other remedy available, and where it is necessary to prevent injustice. *People v. Betts*, 55 N. Y. 600. Also that the office of the writ extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceeding, that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by express terms of statute law, or by the common law. *People v. Board of Assessors*, 39 N. Y. 81. The writ will not lie to try title to office, and the fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action judicial. *People v. Walter*, 68 N. Y. 403. The writ lies only to a tribunal or officer exercising judicial powers to correct errors of law materially affecting the rights of the parties. *People v. Board of Commissioners*, 97 N. Y. 37. It does not lie to review the order of a board of health declaring a business a nuisance, as it is a legislative act. *People v. Board of Health*, 33 Barb. 344.

Certiorari will not lie to correct the proceedings of a county board of supervisors in the equalization of assessments between towns; there being an adequate remedy provided by appeal to the State assessors. *Pro. ex rel Hill v. Board of Supervisors*, 2 Supp. 557. Section 2120 of the Code preserves the writ of *certiorari* as it existed at common law, except where it is especially taken away by statute. Thus *certiorari* is the proper remedy to review a determination of the board of health in relation to the existence and abatement of a nuisance. *Pro. ex rel. v. The Board of Health of Seneca Falls*, 35 St. Rep. 411, 12 Supp. 562. *Certiorari* will lie to review the error of a county judge confirming the report of commissioners appointed to lay out a highway, because in proceedings of that character the county judge acts not as a judge of any court but as an officer specially designated by statute under his title of office. His order therefor is not appealable. *Pro. ex rel. Tittsworth v. Nash*, 38 St. Rep. 730, 15 Supp. 29. *Certiorari* lies to review the action of police commissioners in designating newspapers to publish a list of candidates for election. The court says: "Under such circumstances, a court having general jurisdiction to review and correct the errors of subordinate tribunals should not cramp its authority within the narrowest limits; but hold that it is broad enough to correct the evil complained of unless prevented by the force of some statute. The common-law

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power of this court to correct, by means of this writ, the errors of inferior tribunals exercising judicial or quasi-judicial power, is preserved by the Code of Civil Procedure, § 2120." *Peo. ex rel. v. Martin*, 72 Hun, 369, 55 St. Rep. 453. *Certiorari* lies to review a decision made by the commissioners of the land office directing the issuing of letters patent for lands under water, and it is no valid objection to such review that the grant in pursuance of the decision will be void. *Peo. ex rel. Burham v. Jones*, 112 N. Y. 608.

Certiorari lies to review the action of a board of aldermen, being the only mode by which the action of the board can be corrected or changed in case such action is erroneous. *In re McLean*, 6 Supp. 231. *Certiorari* lies in any case where it would lie at common law unless it is expressly taken away by statute. It therefore lies to commissioners of appraisal to review their proceedings in making an award of damages in street opening case. *Matter of Fitch*, 147 N. Y. 337. It seems that *certiorari* lies to review the determination of a board of railroad commissioners in giving or withholding its consent to the discontinuance of a railroad station. *People ex rel. Laurens v. Commissioners*, 32 App. Div. 168, 52 Supp. 901.

The action of the State superintendent of public instruction in removing a member of the board of education in a free school district constituted under Laws 1858, chap. 34, and the amendatory acts is not made final by Consolidated School Law, title 14, § 1, and may therefore be reviewed by *certiorari*. *Matter of Light*, 30 App. Div. 53. The writ lies to the board of railroad commissioners to review its determination upon an application by a street surface railroad company for permission to change its motive power. *People ex rel. Babylon R. R. Co. v. Commissioners*, 32 App. Div. 182. As no appeal is provided by statute from a judgment of a police court, the proper remedy for the review of the determination of that court is by *certiorari*. *Peo. ex rel. v. City of Rochester*, 44 Hun, 172. *Certiorari* issues to review the proceedings of a board of health to remove a nuisance, if the decision of such board when made is a final adjudication from which there is no appeal. *People v. Board of Health*, 58 Hun, 598. Where there is a special act providing for the review of assessments by *certiorari*, the statute itself determines the procedure; and the provisions of the Code of Civil Procedure in

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reference to *certiorari* are not applicable. *Pvo. ex rel. v. The Assessors of Taxes of the Town of Greenburgh*, 106 N. Y. 671. At common law the writ of *certiorari* lies only to inferior courts and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative; therefore a republican county committee not being a judicial officer or body, its determination that a certain person was elected chairman cannot be reviewed by *certiorari*. *Pvo. ex rel. Trayer Lauterbach*, 7 App. Div. 294.

The order of a county court confirming the report of commissioners appointed under the Highway Law to lay out and open a highway cannot be reviewed by *certiorari*, even though there is no appeal from such order. *Peo. ex rel. v. County Court of Onondaga*, 4 App. Div. 542, 70 St. Rep. 844. *Certiorari* will lie to review the action of commissioners in laying out a highway under the statute, when such action is claimed to be illegal, upon the ground that the act is unconstitutional. *People ex rel. v. Mosier*, 56 Hun, 64, 8 Supp. 621; see, also, *People ex rel. v. Stedman*, 57 Hun, 280, 10 Supp. 787; see, also, for decisions under the Highway Law, *People ex rel. v. Nash*, 60 Hun, 582, 15 Supp. 29; *People ex rel. v. Moore*, 60 Hun, 586, 15 Supp. 504, affirmed, 129 N. Y. 639. It seems that *certiorari* will not lie to review the action of a board of health in ordering the suppression of a nuisance without notice to the person who is alleged to maintain the nuisance, as is required by statute. *People ex rel. v. Board of Health of Seneca Falls*, 58 Hun, 595, 12 Supp. 565. *Certiorari* not mandamus is the proper mode of reviewing the decision of a board of assessors. *People ex rel. v. Gilon*, 56 Hun, 641, 9 Supp. 212, affirmed, 58 Hun, 610, 12 Supp. 629; but *certiorari* will not lie to review an assessment roll where the decision is not final, but can be reviewed upon appeal, or where another remedy is offered by statute. *People ex rel. v. Gilon*, 59 Hun, 623, 13 Supp. 455. Under §§ 2121 and 2122 of the Code of Civil Procedure, a writ of *certiorari* which is brought to review the order of a county court, affirming a report of the commissioners for laying out a highway, on the ground of alleged irregularities in the proceedings which affect the power and jurisdiction of the county court, will be dismissed because the decision of the county court may be reviewed upon appeal. *People ex rel. R. R. Co. v. County Court*, 152 N. Y. 216, reported below, 4 App. Div. 542.

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On the same ground, *certiorari* will not lie to review the order of a county court appointing commissioners to certify to the necessity of altering a highway pursuant to § 84 of the Highway Law. The word "appeal" as used in § 2122 of the Code of Civil Procedure is used in its broad sense, signifying a removal of a cause from a court of inferior to one of superior jurisdiction. *People ex rel. Hanford v. Thayer*, 88 Hun, 139, 68 St. Rep. 280. As the order made by a county judge upon the return of a writ of *habeas corpus* discharging the relator therein from imprisonment, can only be reviewed by an appeal therefrom, such order cannot be reviewed by *certiorari* owing to the restriction of § 2121, Code Civil Procedure. *People ex rel. Cattle v. Tucker*, 16 Civ. Pro. 128, 3 Supp. 793. As *certiorari* cannot issue under § 2121, Code Civ. Pro., to review the determination made in an action or special proceeding by a court of record or a judge thereof, reference is made to § 2, Code Civil Procedure, which enumerates the courts of record. Reference is also made to §§ 1356 and 1357, Code of Civil Procedure, providing for appeals from a determination in special proceedings.

Where police commissioners accept the voluntary resignation of a police officer and proceedings have not been instituted by them for his removal, their action cannot be inquired into on *certiorari*. *People ex rel. Goodwin v. Martin*, 10 Supp. 512, 32 St. Rep. 543; see S. C. on second appeal 66 Hun, 88, 49 St. Rep. 736, also 63 St. Rep. 295. *Certiorari* lies to review a decision of the comptroller denying petition of a domestic corporation for a revision and readjustment of the accounts for taxes against it, although under the statute the relator had an appeal from such determination of the comptroller by statute; such provision for appeal does not apply to a case where the corporation was not subject to any tax whatever and where by amendment to the original act an express provision is made for review by *certiorari* of the action of the comptroller. *People ex rel. B. E. M. Co. v. Wemple*, 129 N. Y. 543; compare *People ex rel. Edison E. L. Co. v. Wemple*, 61 Hun, 60, 39 St. Rep. 605; also *People ex rel. Southern Cotton Oil Co. v. Wemple*, 61 Hun, 83, 15 Supp. 446, 39 St. Rep. 738, 131 N. Y. 64; *People ex rel. Edison E. I. Co. v. Wemple*, 11 Supp. 246, 33 St. Rep. 29; *People ex rel. American Contracting and Dredging Co. v. Wemple*, 60 Hun, 232, 14 Supp. 859, 38 St. Rep. 22.

The owner of lands sold for taxes has no right to review by

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certiorari the determination of the comptroller under § 83, chapter 427, Laws of 1855, which authorized the comptroller, where he shall discover that a sale of land for taxes was invalid or ineffectual, to cancel such sale and refund the purchase money. Such act was intended only to relieve the purchaser from the consequences of a defective tax title. Therefore no right of the owner was finally determined thereby, nor was he a person aggrieved by the decision within the meaning of §§ 2122 and 2127, Code Civil Procedure. *People ex rel. Wright v. Chapin*, 104 N. Y. 369, 8 St. Rep. 722. Where objection was made to the writ of *certiorari* on the grounds that the relator had the right to appeal from a decision of the commissioners of highways laying out a road, it was held that the writ was properly granted, as the proceedings leading up to the order of the commissioners and the determination evidenced thereby could not "be adequately reviewed by an appeal to a court or to some other body or officers," there being in this case substantial irregularities in the preliminary proceedings laying out such highway. *People ex rel. Scrafford v. Stedman*, 57 Hun, 280, 32 St. Rep. 649. *Certiorari* will not lie to review the action of a board of assessors in levying an assessment for improvements because there is not a final determination of the objections raised thereon until they are considered by the board of revision, and also because the Consolidation Act provides other remedies to which relator should resort. *People ex rel. Stevenson v. Gilon*, 36 St. Rep. 1004, 13 Supp. 455. Where the removal of a police officer was reversed on *certiorari*, on the ground of an erroneous refusal to admit testimony, the relator cannot object under subdivision 3 of § 2122, Code Civil Procedure, to a rehearing before the commissioners, on the ground that he is thereby tried a second time for the same offence. *People ex rel. McCormick v. McClave*, 29 St. Rep. 368.

Under subdivision 2 of § 2122, Code Civil Procedure, which prohibits the writ where a determination can be adequately reviewed by an appeal to a court or to some other body or officer, a decision of canal appraisers denying a claim for damages will not be reviewed by *certiorari*; and in any event the writ will not lie while an appeal taken by the relator is pending and undecided. *People ex rel. Benedict v. Dennison*, 28 Hun, 328. The equalization by the board of supervisors of assessors' valuation among several towns cannot be reviewed by *certiorari* because the

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remedy is by an appeal to the State assessors. *People ex rel. Hill v. Supervisors*, 49 Hun, 476, 2 Supp. 557. The action of the railroad commissioners in refusing to grant a certificate of public convenience and necessity under § 59 of the Railroad Law, as amended, cannot be reviewed by *certiorari*, as the refusal to grant such certificate cannot be said to finally determine the rights of the parties and because adequate provision is made for the review of such refusal. *People ex rel. Depew R. Co. v. Board of Railroad Commissioners*, 4 App. Div. 265. The decision of a county court confirming the report of commissioners appointed to lay out a highway is final and cannot be reviewed by *certiorari*, and even if such decision were not final the writ would not lie because the relators have their remedy by appeal. *Matter of Taylor and Allen*, 8 App. Div. 395. While under sub. 1 of section 2122 *certiorari* cannot issue where the determination of the inferior body is not final, it has been held that where a board of auditors reject a claim for insufficiency of proof as to its nature and extent, but allow a smaller amount, such partial rejection is a final determination on the merits which may be reviewed by *certiorari*. *People ex rel. v. Board of Auditors of Hannibal*, 65 Hun, 414, 20 Supp. 165. When, however, in the case above stated the claimant failed to attend and itemize his claim before the board at an adjourned day, of which he had notice, such claimant is not entitled upon *certiorari* to an order awarding him the total amount of the claim. *People ex rel. v. Board of Auditors of Hannibal*, 65 Hun, 414, 20 Supp. 165. *Certiorari* will not lie to review the action of the Governor, as commander-in-chief, in disbanding a company of militia under the Military Code, *People ex rel. v. Hill*, 59 Hun, 624, 13 Supp. 186-637, affirmed, 126 N. Y. 497. As by sub. 3 of § 2122, Code Civ. Pro., the writ will not lie "where the body or officer making the determination is expressly authorized by statute to rehear the matter," it follows that a settlement of an account for taxes against a corporation by the comptroller, under Laws 1889, chap. 463, will not be reviewed as his decision may be revised and readjusted by him. *People ex rel. v. Wemple*, 57 Hun, 594, 11 Supp. 246.

The writ under the former statute ran to assessors to bring up for review their action in assessing property, and numerous decisions were made, and much discussion had as to how far the action of assessors was reviewable by the writ. This question has lost

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its practical importance since the enactment of chapter 269 of laws of 1880, providing for the review of the action of assessors, which was re-enacted in Tax Law, § 250, etc., which is treated under a separate head. Some of the decisions are, however, given, bearing on the right to review assessments. One of the most important previous to the statute is *Swift v. City of Poughkeepsie*, 37 N. Y. 511. The following are also on the same point: *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *People v. Assessors of Albany*, 40 id. 154; *People v. Trustees of Ogdensburg*, 48 id. 390. The proceedings of commissioners of taxes and assessments, being judicial in their nature, can only be reviewed or questioned in the courts by writ of *certiorari* prosecuted by the party aggrieved, and if parties fail to appear at the proper time and ask the reduction for cause shown, they are subsequently concluded from reviewing the action of the commissioners by *certiorari*. *People v. Wall Street Bank*, 39 Hun, 525. But that question will not be passed upon an appeal if not raised below. *People v. Hicks*, 2 State Rep. 294.

Since the act of 1880 expressly allows evidence to be taken by the court as to the facts on which the assessors have based their judgment, and that statute is now uniformly used on such review, much of the discussion as to the questions to be reviewed is necessarily superseded by the enactment. The writ lies to review acts of boards of supervisors, which are judicial in their nature; also to review and correct items illegally included in a tax levy and warrant. *People v. Supervisors of Westchester*, 57 Barb. 377. It is proper when supervisors reject, as not just and legal, a claim which the legislature has declared to be legal, and has directed them to audit and allow. *People v. Supervisors*, 51 N. Y. 442. It was granted in *People ex rel. Burhans v. Supervisors of Ulster*, 32 Hun, 607, to review the action of a board of supervisors in fixing the amount of costs on an equalization appeal on behalf of respondents under the statute. But in passing resolutions to raise money supervisors do not act judicially, and *certiorari* does not lie. *People v. Supervisors*, 43 Barb. 332. It was granted to canal appraisers, where they appraised damages without notice to the owner, and without giving him an opportunity to be heard or produce witnesses. *Fonda v. Canal Appraisers*, 1 Wend. 288. See *People v. Dennison*, 28 Hun, 328. The proceedings of a board of justices of the peace of a town have been reviewed by *certiorari*.

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Wildy v. Washburn, 16 Johns. 49. The writ was allowed against the comptroller to review his decision on hearing of an appeal from equalization by a board of supervisors. *People v. Hillhouse*, 1 Lans. 87. Relator, as owner of lands which had been sold for taxes, petitioned the comptroller to cancel such sale, that any conveyance made thereunder be set aside, which was denied, and the denial affirmed at General Term. In Court of Appeals, *held*, that relator was not a person aggrieved within the meaning of the Code. *People ex rel. v. Chapin*, 23 Week. Dig. 410, dismissing appeal from 38 Hun, 272. It has also run to board of commissioners of pilots to review their action in irregularly revoking licenses of pilots. *People v. Commissioners*, 54 Barb. 145. *Certiorari* has been granted to review the determination of the canal board; the fact that the board, after the granting of the writ, rescinded its decision does not affect relator's rights. *People v. Canal Board*, 7 Lans. 220. The writ lies to referees in highway cases as to questions of jurisdiction and regularity. If regular, the decision below on the merits is final. *People v. Van Alstyne*, 32 Barb. 131. The proceedings of the board of metropolitan police in removing a policeman are reviewable by *certiorari*. *People v. Board of Police*, 3 Abb. Dec. 488; *People v. Board of Police*, 26 Barb. 481; *People v. Board of Police*, 43 How. 385. Also, of the fire department of Brooklyn, *Pennie v. City of Brooklyn*, 97 N. Y. 654; *Smith v. Commissioners, etc.*, 3 State Rep. 615.

A proceeding to remove the head of a department under the charter of the city of New York is judicial, and, therefore, subject to review by *certiorari*. *People v. Nichols*, 79 N. Y. 582. The decision of the superintendent of insurance, fixing the compensation of a receiver, cannot be reviewed by *certiorari*. *People v. Fairman*, 17 Week. Dig. 168. The decision of assessors of a town under Town-Bonding Act upon the question whether the required number of taxpayers have given their consent to the issuing of bonds to a railroad company may be reviewed by *certiorari*. *People v. Morgan*, 65 Barb. 473. The writ also ran to a county clerk or county judge under the Midland Railroad Bonding Act for the same purpose. *People v. Deyo*, 2 T. & C. 142; *People v. Wagner*, 7 Lans. 467. The writ lies to review the action of the board of health in refusing to register unrecorded births. *Ex parte Lauterjung*, 16 J. & S. 308. The writ lies to review proceedings of a court-martial convicting the relator. *People v.*

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Townsend, 10 Abb. N. C. 69; *Matter of Brackett*, 27 Hun, 605. But the decision of a court-martial cannot be reviewed on *certiorari* if the court had jurisdiction of the subject-matter and of the person of the accused, and if there was any evidence in support of the charges and specifications. *People ex rel. v. Rand*, 41 Hun, 529, 5 State Rep. 31. The writ was held to lie to review an adjudication of contempt though the warrant of commitment had not been issued, the order for the warrant being regarded as a final adjudication. *People v. Donohue*, 22 Hun, 470. The ordinance of a common council directing certain work to be done is final and reviewable by *certiorari*. *People v. Common Council*, 65 Barb. 9. The writ will not lie to review an unlawful decision of a county board of canvassers by which a party intrudes in office. This is a ministerial and not a judicial act. *People v. Van Slyke*, 4 Cow. 297. Nor to the trustees of a school district to review their proceedings. *Storm v. Odell*, 2 Wend. 287; *Saratoga & W. R. R. Co. v. McCoy*, 5 How. 378; see *Easton v. Callender*, 11 Wend. 90. *Certiorari* to review the action of canal appraisers will not lie pending an appeal to the canal board. *People v. Dennison*, 28 Hun, 328. When the action of a board of supervisors is legislative or ministerial in its character it cannot be reviewed on *certiorari*. *People v. Supervisors*, 25 Hun, 131. The action of a board of excise denying the application to revoke a license on the ground that the licensee had violated the provisions of the statute, is not reviewable by *certiorari* if the board has not exceeded its jurisdiction nor proceeded otherwise than according to law. *People v. Board of Excise*, 24 Hun, 195. Where a board of commissioners had jurisdiction and there was evidence legitimately tending to support its decision, and no rule of law was violated, its determination could not be reviewed on a common-law *certiorari*. *People v. Fire Commissioners*, 82 N. Y. 358. See *Pennie v. City of Brooklyn*, 97 N. Y. 654; *Smith v. Commissioners*, 3 State Rep. 615. The writ does not lie to review the report of the commissioners awarding damages occasioned by changing grade of a village street. The remedy is by appeal from the final order of confirmation. *People v. Cobb*, 14 Abb. N. C. 493. *Certiorari* is the proper remedy to review irregularities in a village election. So held in *Dows v. Village of Irvington*, 66 How. 93. The writ lies to review determination of board of supervisors acting as a board of audit. *People v. Supervisors*

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of *Madison*, 51 N. Y. 442. Where a statute fixed the proportion of certain expenses which should be borne by certain villages, and by the county respectively, and the police commissioners of the villages, disregarding the statute, rendered an account of such expenses, which charged the whole amount to the county, which amount defendants were proceeding to levy,—*held*, that this was a grievance which could be reviewed on the relation of a taxpayer, but he was without remedy where it appeared that before argument the tax was levied and in part paid. The writ does not operate *per se* as a stay of proceedings. *People v. Supervisors*, 23 Week. Dig. 568. Also to review summary proceedings instituted by the holder of a tax title in the city of Brooklyn. *People v. Andrews*, 52 N. Y. 445. Writ will not lie to village to review alleged irregularities in proceedings by which it is claimed to have been incorporated. *People v. Nelliston*, 18 Hun, 175. The writ will lie to officer removing head of a department under New York City charter, as it is a judicial act. *People v. Nichols*, 58 How. 200; *People v. Mayor*, 19 Hun, 441; *People v. Cooper*, 21 id. 517. Previous to the Code of Civil Procedure *certiorari* lay to review summary proceedings before a justice. *People v. Perry*, 16 Hun, 461 (1879). A *certiorari* will not lie to review proceedings for laying out a highway pending an appeal to the county judge. *People v. Wallace*, 2 Hun, 152; see *Buckley v. Drake*, 41 id. 384. Where the writ is directed to a board, as that of public works in the city of New York, it should be to the members by their individual names. *People v. Commissioners*, 97 N. Y. 37.

Certiorari lies to review a municipal assessment for a local improvement where there has been an essential departure from the statute in principle of assessment. *Leroy v. Mayor of New York*, 20 Johns. 430; *Starr v. Trustees of Rochester*, 6 Wend. 564; *People v. City of Rochester*, 21 Barb. 656; see *Ex parte Mayor of Albany*, 23 Wend. 277. To vacate an assessment on the ground that the assessors erred in their determination as to what property was benefited, the remedy is by *certiorari*, not by suit in equity. But otherwise if the assessors proceed on a wrong rule of law. *Kennedy v. City of Troy*, 19 Alb. L. J. 498, 77 N. Y. 443. *Certiorari* is the proper remedy to review the proceedings of municipal bodies. *People v. City of Rochester*, 21 Barb. 656; *Heywood v. City of Buffalo*, 14 N. Y.

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534; *People v. City of Utica*, 65 Barb. 9. Proceedings for grading and opening street may be reviewed by *certiorari*. *People v. City of Brooklyn*, 8 Hun, 56; *Bouton v. Brooklyn*, 2 Wend. 395. In order, however, to warrant interference with a municipal corporation by *certiorari*, the act must be plainly judicial. A *certiorari* does not lie to review a corporate resolution appropriating money for a public square. *Matter of Mt. Morris Square*, 2 Hill, 14.

It has been granted to review assessment for opening a sewer for paving streets, for grading avenues, for the construction of a bridge. *People v. Mayor of Brooklyn*, 9 Barb. 535; *People v. City of Brooklyn*, 49 id. 136; *People v. City of Rochester*, 21 id. 656; *Bouton v. President, etc.*, 2 Wend. 395; *Leroy v. Mayor*, 20 Johns. 430; *Ex parte Mayor of Albany*, 23 Wend. 277; *People v. City of Utica*, 65 Barb. 9. It is held in *People v. Board of Assessors*, 2 Hun, 583, that the writ will be granted only to review assessments on special cause shown, and will be superseded if it appears the remedy sought is against justice and convenience. Also, in the *Matter of Eightieth Street*, 17 Abb. 324, that the writ should be refused in case of a local improvement when there is another adequate remedy. It is held in *People v. McDonald*, 4 Hun, 187, affirmed, 69 N. Y. 362, that *certiorari* should not be granted on the application of two or three out of a large number of persons interested in like manner in assessments for local purposes, especially where adequate relief is afforded in proceedings at law, and this is in conformity with the earlier decisions. In the *Matter of Mt. Morris Square*, 2 Hill, 14, that in general the court ought not to allow the writ where assessments of taxes or awards of damages are in question, which affect any considerable number of persons. It is said in that case, that if there be a want of jurisdiction even in the judicial act sought to be reviewed; or, in other words, if there be any excess of legal power by which a person's rights may be injuriously affected, an action lies, and it is much better that he should be put to this remedy than that the whole proceeding should be arrested, and, perhaps, finally reversed for such a cause.

It is further held that the writ will not lie to review the proceedings of any person, officer, or body, acting under a naked power conferred by law to take private property for public use; and in this respect it is followed in *People v. Nearing*, 27 N. Y.

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306, holding that where property is taken for public use without making compensation to the owner by reason of the fact that his case was not provided for by the statute directing the assessment of compensation, the remedy is not by *certiorari* to review the commissioners' action, but by action for trespass. The writ will not, according to the foregoing authorities, be allowed for the purpose of reviewing official proceedings of a municipality of either a legislative, executive, or ministerial character. Nor was it granted to review an assessment after great delay, where the work has been prosecuted and tax partially collected. *Elmendorf v. Mayor*, 25 Wend. 693; *People v. Mayor*, 2 Hill, 9. *Certiorari* will lie to a board of State officers to review their decision apportioning the expenses of board of railroad commissioners, under Laws of 1882, as they act in a quasi-judicial character. *People v. Chapin*, 42 Hun, 239. As to the present limitation of time within which the writ will be granted, see § 2125. The summary remedy for relief from assessment by petition was held, in *Matter of Mead*, 74 N. Y. 216, to be statutory and independent of any right to relief to which a party might be entitled by a writ of *certiorari*. It was broadly held in *Western R. R. Co. v. Nolan*, 48 N. Y. 513, and in *People v. Supervisors of Westchester*, 57 Barb. 383, that an illegal assessment may be reversed by *certiorari*. But it will not lie to review an assessment after the roll has been delivered to the supervisors and the tax collected. *People v. The Commissioners of Taxes*, 43 Barb. 494; *People v. Reddy*, id. 539; *People v. Fredericks*, 48 id. 173; *People v. Supervisors of Albany*, 23 Week. Dig. 568. A writ of *certiorari* to assessors to compel the correction of an assessment-roll is ineffectual, when such roll has passed from their possession and control to the board of supervisors before the writ was issued, even though it was directed to the board of supervisors as well. *People v. Tompkins*, 40 Hun, 228. A writ of *certiorari* is an appropriate remedy to review the proceedings of a municipal corporation in procuring a local improvement. *Hanley v. New York*, 16 How. 228. And that an injunction is not the proper remedy is held in same case, and *Mace v. Trustees of Newburgh*, 15 How. 161.

Certiorari lies to review summary proceedings for forcible entry and detainer pending a traverse of the inquisition. *People v. Covill*, 20 Hun, 460. Under the statute relating to sales of

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land for taxes, the comptroller can be applied to to set aside an invalid sale, and his action reversed by *certiorari* or mandamus. *Clark v. Davenport*, 95 N. Y. 478. The remedy of a party believing himself aggrieved by a decision of the comptroller denying an application for the cancellation of a sale for taxes is by *certiorari* and not by mandamus. *People v. Chapin*, 39 Hun, 230. See *People v. Chapin*, 23 Week. Dig. 410. As to the review of illegal assessment by the writ, see chapter 269, Laws of 1880, subsequently treated.

Where a private individual illegally assumes to act as justice of the peace, his judgment requires no reversal on *certiorari* being absolutely void and the act of a mere trespasser. *People ex rel. v. Moore*, 48 Hun, 619, 1 Supp. 405. Where the action of a board created by statute is not judicial, it is not reviewable on *certiorari*. Thus where the Laws 1892, chap. 331, as amended, required the comptroller of the city of New York to pay debts incurred by a committee, after the same shall have been audited by the board of estimate, it was held that the action of the board as to the debt was not reviewable, not being judicial. *People ex rel. v. Gilroy*, 72 Hun, 637, 25 Supp. 878; see, also, *Lannigan ex rel. v. Mayor, etc.*, 70 N. Y. 456. *Certiorari* will not lie to review the action of an association in expelling a member, where there is a remedy by appeal. *People ex rel. v. Medical Society of Dutchess*, 84 Hun, 448, 32 Supp. 415; thus relief from the action of a person assuming to act as justice of the peace should be had on appeal from justices' court under the Code. *People v. Moore*, 48 Hun, 619, 1 Supp. 405. *Certiorari* will not lie to review the commitment of a magistrate, as the remedy is by appeal, the writs of *certiorari* and error in special proceedings of a criminal nature being abolished by § 515, Code Criminal Procedure, *People ex rel. v. Murray*, 62 Hun, 30, 16 Supp. 325.

Where a board of supervisors has considered an account on its merits and in good faith rendered a decision as to the amount which should be allowed, mandamus cannot issue to compel another audit, but the decision may be corrected or reversed by *certiorari*. *People ex rel. O'Mara v. Supervisors of Cayuga County*, 40 St. Rep. 239, 16 Supp. 256. It seems that although the allowance of *certiorari* is discretionary, that discretion is not arbitrary, and the writ will always issue where there is a proper subject for review, and therefore *certiorari* is considered to be an ample and sufficient

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remedy. *U. L. T. Co. v. Grant*, 137 N. Y. 12. But it seems that though the action of a common council, when illegal and without authority, may be reviewed by *certiorari*, yet such review and reversal by *certiorari* is not a full and adequate remedy for the illegal and improper expulsion of one from public office. *Armitage v. Fisher*, 4 Misc. 326, 56 St. Rep. 385. If it concerns an erroneous decision at law, the relator's remedy, if he have any, is by *certiorari* and not by mandamus. *People ex rel. Myers v. Barnes*, 44 Hun, 576. On *certiorari* by the forest commission to review a cancellation of a tax sale and a determination of the comptroller refusing to set aside such cancellation as having been made without authority, the court has power to set aside such cancellation on such terms with respect to the restitution of the moneys received by the State thereon as justice requires. *People ex rel. Forest Commissioners v. Campbell*, 156 N. Y. 64, 50 N. E. Rep. 417, reversing, 22 App. Div. 170, 48 Supp. 183, 82 St. Rep. 183. Where a bill against a county for services is not based on any agreement, express or implied, but the measure of compensation is the reasonable value of the services, the board of supervisors have a right to exercise their judgment and discretion, and their determination will not be reviewed on *certiorari* unless it appears to have been clearly erroneous and against the weight of the testimony upon which they acted. *Matter of Lanchart*, 32 App. Div. 2, 52 Supp. 671, 86 St. Rep. 671. The determination by the board of railroad commissioners as to a change of motive power is a judicial one, and is reviewable by *certiorari*. *People ex rel. Babylon R. R. Co. v. Bd. Railroad Commrs.*, 32 App. Div. 179, 52 Supp. 908, 86 St. Rep. 908. The removal by the State superintendent of public instruction of a member of the board of education of a union free school district is reviewable upon *certiorari*, and the decision of the Special Term upon the application for the writ is not final. *Matter of Light*, 30 App. Div. 50, 51 Supp. 743, 85 St. Rep. 743.

Acts of justices of the peace while acting in the position of inspectors of an election are merely those of ministerial officers, and if they permit unauthorized persons to keep the tally sheets and declare the result of the canvass, and to aid in the distribution of tickets, etc., the conduct of the justice is not a judicial action and cannot be reviewed by a writ of *certiorari*. *Peo. ex rel. Brooks v. Bush*, 22 App. Div. 363, 48 Supp. 13, 82 St. Rep. 13. The action of a board of trustees of a village in fixing, under

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ch. 430, Laws, 1895, a "fair reasonable compensation" for the services of a member of the village board of health, is administrative or legislative in its nature, and consequently cannot be reviewed by a writ of *certiorari*. *Peo. ex rel. Smith v. Trustees of Village of Haverstraw*, 23 App. Div. 231, 48 Supp. 740, 82 St. Rep. 740.

A proceeding under the general Municipal Law by resident freeholders of a village, who claim that its officers are unlawfully expending moneys raised by taxation and ask investigation, is a special proceeding, and the decision of the justice is not reviewable by a writ of *certiorari*. *Peo. ex rel. Guybord v. Kellogg*, 22 App. Div. 176, 47 Supp. 1023, 81 St. Rep. 1023. The comptroller of the State of New York has no power, upon application of the owner of lands sold for taxes, to cancel the sale upon the ground of its illegality, even where the State is a purchaser; yet where the comptroller requires as a condition for vacating such a sale the payment by the owner of all the taxes in arrears, and the treasurer receives and retains for the State's use the moneys so paid, the cancellation of the same should be reviewed in a suit in equity, and not by *certiorari*. *Peo. ex rel. Forest Commrs. v. Campbell*, 22 App. Div. 170, 48 Supp. 183, 82 St. Rep. 183. The decision of the superintendent of public instruction in removing school trustees in a case of which he has jurisdiction is made final by statute, and cannot be reviewed by *certiorari*. *Matter of Light*, 21 Misc. 737, 49 Supp. 345, 83 St. Rep. 345. *Certiorari* is only available to review a determination, judicial in character, and as the functions of a town board conducting a town election are not judicial, *certiorari* will not lie to review their proceedings. Where there is no allegation in the petition of any judicial action, nor anything of that character appearing in the return, it will be presumed that the acts performed by a town board are wholly ministerial and therefore not subject to review by *certiorari*. *Peo. ex rel. Van Sickel v. Austin*, 20 App. Div. 2.

As there can be no review by *certiorari* of an order which is not a final determination, an order made under the provisions of the County Law, Laws 1892, chap. 636, §§ 125 and 126, by a justice directing a person to kill a dog found to be vicious, may not be reviewed by *certiorari*, as such order is not a final determination of the rights of the relator. *Peo. ex rel. Renshaw v. Gillespie*,

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25 App. Div. 93, 82 St. Rep. 882, 48 Supp. 882. The action of supervisors in passing a resolution for the improvement of town roads cannot be reviewed on *certiorari*. *Pco. ex rel. Village of Jamaica v. Supervisors of Queens*, 131 N. Y. 468, 43 St. Rep. 665, reversing 42 St. Rep. 22, 16 Supp. 705. As the board of excise of New York has the right to remove an inspector of excise at its pleasure, its proceedings in doing so cannot be reviewed on *certiorari*. *Pco. ex rel. Lion v. Murray*, 5 App. Div. 288, 39 Supp. 227; nor is the determination of a board of health as to a nuisance reviewable by *certiorari*. *Pco. ex rel. Copcutt v. Board of Health of Yonkers*, 140 N. Y. 1, 55 St. Rep. 422. *Certiorari* lies to review the refusal of the board of health of a city to register births of children under Laws of 1880, ch. 295. *Matter of Lauterjung*, 48 Supr. Ct. 308. It lies to review the irregularities in a village election. *Dows v. Village of Irvington*, 66 How. Pr. 93. The writ will not lie to review mere ministerial acts, or acts resting wholly in discretion. *People ex rel. McCanna v. Commissioners of Charity of Kings Co.*, 1 App. Div. 1, 36 Supp. 1002, 72 St. Rep. 104. If the court has acquired jurisdiction of the subject-matter and parties by petition, the relator is entitled to the issue of the writ as a matter of right. *Matter of Wincgard v. Komer*, 5 Misc. 54, 25 Supp. 48.

ARTICLE III.

WHAT COURT MAY ISSUE WRIT AND WITHIN WHAT TIME.

§§ 2123, 2124, 2125, 2126.

§ 2123. [Am'd, 1895.] When issued from supreme court.

A writ of *certiorari* can be issued only out of the Supreme Court, except in a case where another court is expressly authorized by statute to issue it.

L. 1895, ch. 946.

§ 2124. When from another court.

Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of *certiorari*, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place fixed by the court, and designated in the writ, for the purpose of supplying any diminution, variance, or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.

2 R. S. 599 § 45 (2 Edm. 621); see § 1215.

§ 2125. Limitation of time for review.

Subject to the provisions of the next section, a writ of *certiorari* to review a deter-

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mination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.

§ 2126. [Am'd, 1895.] Id.; in case of disability.

The appellate division of the Supreme Court may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life.

This provision of § 2125 is new; as theretofore no limit was fixed at common law within which a writ would issue, and the practice had been analogous to the limitations of writs of error. *People v. Mayor*, 2 Hill, 9; *Elmendorf v. Mayor*, 25 Wend. 693. It was held, in *People v. Hill*, 53 N. Y. 547, that unreasonable delay in applying for the writ was ground for refusing it, and for quashing it even after a hearing on the return.

Compare § 2120, Code Civil Procedure, where it is provided that the writ of *certiorari*, except the writ specified in § 2124, is issued to review the determination of a body or officer.

In proceedings by *certiorari* it is only the hearing of the merits which is to be had at the General Term. All incidental motions should be heard at Special Term. *People ex rel. McNeary v. MacLean* 64 Hun, 206, 19 Supp. 56, 46 St. Rep. 99. The writ of *certiorari* must be served within four calendar months after the determination of the body which is sought to be reviewed thereby, even though the decision merely suspended the relator from his position, and though such suspension might not be considered to be a final determination. *People ex rel. Perry v. Stark*, 22 St. Rep. 531, 4 Supp. 820. A determination of commissioners of highways laying out a highway is final and binding when made, recorded, and posted, and brings the matter under the limitation of § 2125, Code Civil Procedure, requiring the writ to be served within four months after such determination; the fact that an appeal has been brought to review such determination does not suspend during its pendency the running of the statute. *People ex rel. Cook v. Hildreth*, 126 N. Y. 361, 37 St. Rep. 394.

The collection of an assessment will not be restrained by an injunction where the plaintiff has lost the remedy by *certiorari* to review the same, owing to the running of the limitation of § 2125,

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Code Civil Procedure. *Postal Tel. Cable Co. v. Grant*, 11 Supp. 323. The provision of § 413 of the Code of Civil Procedure, which provides that the Statute of Limitations can only be taken advantage of by answer, does not apply to the limitation to *certiorari* provided for in § 2125, Code of Civil Procedure, and therefore it is not necessary to take advantage of such section by setting it up in the return. Such writ, therefore, served after the expiration of the time limitation may be quashed upon motion of the defendant. *People ex rel. Conner v. Purroy*, 19 Supp. 907, 22 Civ. Pro. 116; see further on this point, *People ex rel. McNeary v. MacLean*, 64 Hun, 206, 19 Supp. 56, 46 St. Rep. 99, where the court says: "It is urged that the only method in which the appellants could claim the advantage of the Statute of Limitations contained in § 2125 is by setting the same up in the return. It is apparent that such cannot be the rule, because the Code requires no defence to the issuance of the writ to be returned, but simply the proceedings upon which the judgment of the inferior tribunal was founded. Where it appears upon the face of the petition that the statute has run, it is not necessary that the fact should be brought before the court in any other manner. The statutory limitation of four months of § 2125, Code Civil Procedure, within which *certiorari* must be brought to review the decision of a board, begins to run against the refusal of police commissioners to reconsider their action in accepting the resignation of a policeman from the date of the refusal to reconsider and not from the date of accepting the resignation. *People ex rel. Goodwin v. Martin*, 30 Supp. 1107, 82 Hun, 6, 63 St. Rep. 298; but compare 66 Hun, 93, 20 Supp. 944, 49 St. Rep. 739. The expiration of the four months' limitation in § 2125 opposes an insuperable bar to the issuance of the writ of *certiorari*. *Jordon v. Board of Education*, 14 Misc. 119, 69 St. Rep. 623, 25 Civ. Pro. 89. It seems that where an improper classification of civil service positions has been made by a mayor, *certiorari* to review the same must be brought within four months from the time of such classification. *Chittenden v. Wurster*, 152 N. Y. 345.

Before the enactment of §§ 2125 and 2126, Code Civil Procedure, there was no statute or rule of law prescribing any fixed period within which *certiorari* must be applied for, and the granting of the same was always a matter of discretion. *People ex rel. Smith v. Cooper*, 22 Hun, 515. The provision of chapter 457 of the

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Laws of 1881, which required that a writ of *certiorari* to review the determination of police commissioners removing a member of the police force, must be granted and served within thirty days after the relator was notified of his removal, is not enlarged by the four months' limitation, given by § 2125, Code Civil Procedure. These statutory provisions are not inconsistent though they describe different limitation, and the special limitation of Laws 1881 is of paramount authority in any cases arising thereunder. *People ex rel. Dunnigan v. Commissioners of Police*, 47 Hun, 408, affirmed without opinion 110 N. Y. 681. Where a relator in *certiorari* proceedings is out on bail, and had full liberty pending an indictment, he is subject to the four months' limitation of § 2125, and cannot avail himself of the enlargement of time given by subdivision 3 § 2126. *Matter of Squire v. City of N. Y.*, 16 St. Rep. 946, 3 Supp. 141. The four months' limitation of § 2125 applies to *certiorari* brought on the ground of a lack of jurisdiction as well as if brought on any other ground. *People ex rel. Springsted v. Trustees of Cobleskill*, 49 St. Rep. 48, 20 Supp. 920. Under the limitation of this section *certiorari* will not lie to review the action of dock commissioners in removing the relator from the position of bookkeeper, after four months from such determination and notice thereof to the relator. *People ex rel. Perry v. Stark*, 52 Hun, 611, 4 Supp. 820.

Where no notice of the final completion of the assessment roll has been given, the time to apply for a *certiorari* to review it is unlimited. *Peo. ex rel. Swartwout v. Village of Port Jervis*, 23 Misc. 317, 52 Supp. 59, 86 St. Rep. 59.

The four months' limitation of this section applies where an assessment is sought to be reviewed, even though it be on the ground of want of jurisdiction. *People ex rel. v. Trustees of Cobleskill*, 66 Hun, 628, 20 Supp. 920. The remedy of the respondent, where the limitation of this section has expired, is by motion; § 413 of the Code Civil Procedure providing that the Statute of Limitations can only be taken advantage of by answer does not apply. *People ex rel. v. Purroy*, 22 Civ. Pro. 116, 19 Supp. 907. Though the four months' limitation of § 2125 is extended to twenty months, where the relator is imprisoned on a criminal charge, yet one who is out on bail during the four months following his indictment, is not entitled to this extension by § 2126. *People ex rel. v. City of New York*, 49 Hun, 607, 3

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Supp. 141. There is a broad difference between a statute of limitations and the time provided by statute within which a proceeding must be instituted, and the limitation of § 2125 is more analagous to the time given in which to take appeal, in which case the party seeking the remedy must bring himself within the statute; therefore where a determination sought to be reviewed by *certiorari* has become final, because the writ is issued more than four months after the determination sought to be reviewed, such writ may be quashed upon motion. *People v. Purroy*, 22 Civ. Pro. 117, 19 Supp. 907. As to whether the determination by commissioners of city works in levying an assessment for a sewer, is final and binding upon the relator within the meaning of § 2125, see *People ex rel. Tabor v. Adams*, 45 St. Rep. 270, 18 Supp. 441. Proceedings by *certiorari* may be instituted at any time within four months after the right accrues. *Martin v. Simons*, 4 Misc. 8.

The right to *certiorari* is a right which accrues when the determination to be reviewed becomes final and binding upon the relator, and it must be granted within four calendar months after the determination to be reviewed becomes thus final and binding. *People ex rel. Bronks Gas Co. v. Barker*, 22 App. Div. 165. It seems that proceedings taken by *certiorari* issued on the 3d of September to review a determination of a department of public parks in New York, which became final on the 30th day of April, is barred by § 2125. *People ex rel. Traphaghen v. King*, 13 App. Div. 401.

ARTICLE IV.

PETITION AND NOTICE OF APPLICATION FOR THE WRIT.

§§ 2127, 2128.

§ 2127. [Am'd, 1895.] **Application for writ; where and how made.**

An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed; must be founded upon an affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at a term of the appellate division of the Supreme Court or at Special Term; and the granting or refusal thereof is discretionary with the court.

L. 1847, ch. 280, § 17 (4 Edm. 561); L. 1895, ch. 946.

§ 2128. **When notice necessary; service thereof.**

Until provision is made, in the general rules of practice, for requiring, or dispensing

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with notice of the application for the writ, the court to which the application for the writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served, with copies of the papers upon which the application is to be made, upon the body or officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of *certiorari*. The service must be made, at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.

It must appear that some one is aggrieved, and the extent of their interest. *Ex parte Mayor of Albany*, 23 Wend. 277. A petition to review the illegality of an assessment under chapter 269, Laws of 1880, may be presented by a number of petitioners, and verified by one. It is not necessary each petitioner should sign the petition; it may be signed by an attorney. *People ex rel. v. Coleman*, 41 Hun, 307. The application for the writ was formerly founded on affidavit. *Fitch v. McDowell*, 7 Cow. 537. Cause must be shown in all cases where *certiorari* is brought to review the proceedings of an inferior tribunal for error. It is never granted, of course, except when sued out by the people. *Munn v. Baker*, 6 Cow. 396. Before allowing or acting upon the writ the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. *People v. Mayor*, 5 Barb. 43; *Conover v. Derlin*, 24 Barb. 641. When granted upon mere suggestion without affidavit, the writ was quashed on application of defendant. *Bogert v. Mayor of New York*, 7 Cow. 158; *Comstock v. Porter*, 5 Wend. 98. A *certiorari* to review the acts and decisions of special jurisdictions created by statute, and not proceeding according to the course of the common law, is not a matter of right, but will only be granted on cause shown. *People v. Supervisors of Allegany*, 15 Wend. 198. An order allowing the writ will not be reversed, except in case of a palpable abuse of discretion. *People v. Cooper*, 9 Week. Dig. 229. It is within the discretion of the Supreme Court to grant or withhold the writ, even if the relator has no other remedy, and the decision cannot be reviewed in Court of Appeals. *People v. McCarthy*, 102 N. Y. 630. The writ can only be granted at a General or a Special Term of the court, but when the order granting the writ shows by the caption that the writ was regularly granted at

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Special Term, at a time and place when a term for hearing *ex parte* motions might have been held, and that it was allowed by one of the justices of the court, this should be held conclusive on a motion to quash. *People ex rel. Burhans v. Supervisors of Ulster*, 19 Week. Dig. 208. The affidavit should not be entitled. *Haight v. Turner*, 2 Johns. 371; *Whitney v. Warner*, 2 Cow. 499.

A petition on *certiorari* should not be quashed because it sets out other grounds not material to the questions involved, where it does clearly state adequate grounds of complaint. *People ex rel. v. McComber*, 7 Supp. 71. The Forest Commission has been a continuous body since its creation, and is a proper relator in *certiorari* proceedings under § 2127, Code Civil Procedure, and such commission may act in the names of the individual members composing it, or may act as a body. *People ex rel. Forest Commission v. Campbell*, 152 N. Y. 56, reversing 82 Hun, 338, 614, 64 St. Rep. 98, 31 Supp. 449. As by § 2127 the granting or refusal of the writ is discretionary with the court, an order which quashes or dismisses the writ is not appealable to the Court of Appeals, unless it appears in the order that the quashing or dismissal of the writ was made for want of jurisdiction, or upon the ground that the proceedings were found to be irregular. *People ex rel. O'Connors v. Supervisors*, 153 N. Y. 374. It is a conclusive answer on appeal that *certiorari* was refused as a matter of discretion unless it is claimed that the writ was denied by the court for want of power to issue it in the case presented. *People ex rel. Leo v. Hill*, 37 St. Rep. 115, 13 Supp. 188, affirmed, 126 N. Y. 502, 792. If it appears upon the face of the papers in proceedings of *certiorari* to review the relator's removal from an office, that he was never entitled to the office, he is not, "a person aggrieved by the determination to be reviewed," and is not entitled to the writ, under § 2127, Code Civil Procedure. *People ex rel. Russell v. The Commissionerz*, 76 Hun, 149, 57 St. Rep. 305. Section 2127, Code Civil Procedure, merely embodies the pre-existing practice of the courts as to its discretion in issuing *certiorari*. The court distinguishes between the common-law writ and the statutory writ of *certiorari* to review illegal assessments, and holds that the granting of the statutory writ is not a matter of discretion, but the petitioner is entitled thereto as a matter of right. *Matter of Corwin*, 135 N. Y. 248, 48 St. Rep. 239; *People ex rel. C. M. I. Co. v. The Commissioners*, 144 N. Y. 487.

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A person not owning the adjoining lands, and having no grant of lands under the waters of a navigable river, is not a party aggrieved by the decision of the commissioners of the land office granting such lands, and is therefore not entitled to review the same by *certiorari*. *People ex rel. Blakslee v. Commissioners*, 135 N. Y. 449, 48 St. Rep. 433. The fact that the application for the writ may be made either at Special Term or in the appellate division does not affect the right of the latter court to review a Special Term decision, though the application was first made to the Special Term. *Matter of Light*, 30 App. Div. 52, distinguishing *Boechat v. Brown*, 9 App. Div. 369.

The board of fire commissioners of Auburn has power to dissolve volunteer hose companies, and "a person aggrieved" within the meaning of § 2127 of the Code, relating to *certiorari*, does not include a member of such company. *Peo. ex rel. Healey v. Fire Commrs.*, 27 App. Div. 530, 50 Supp. 506, 84 St. Rep. 506. Where the allegations of the petition and the writ are indefinite the remedy is by motion, before filing the return, to make them more definite and certain. *Peo. ex rel. N. Y. C. & H. R. R. Co. v. Budlong*, 25 App. Div. 373, 49 Supp. 484, 83 St. Rep. 484.

The order of the court quashing the writ of *certiorari* issued to review the proceedings of the State board of equalization is discretionary under Code of Civil Procedure, § 2127, and is not reviewable on appeal, except where the court has refrained from exercising its discretion, and quashes the writ upon the ground of a want of power to issue it. *People ex rel. Mayor v. McCarthy*, 102 N. Y. 635. While the issuance of the common-law writ is discretionary under the Code, the statutory writ to review the decision of an excise board is imperative and not a matter of discretion. *People ex rel. Deutsch v. Dalton*, 9 Misc. 251.

Petition for Certiorari to Review Action of Supervisors.

(17 App. Div. 202.)

To the Supreme Court of the State of New York :

The petition of William H. Baldwin respectfully shows :

That he is over 21 years of age and resides in the town of Dix, in Schuyler County, in the State of New York, and is and has been for the past 20 years the owner, proprietor, and editor of a newspaper known and called "The Watkins Democrat," which is published and issued weekly in the village of Watkins in said county of Schuyler, N. Y. That said newspaper consists of two sheets mak-

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ing four pages of printed matter, containing the current, and local news of the day, advertisements, legal notices, editorials and correspondence, and is devoted to the dissemination of news, and information to the public, and has about 700 regular subscribers.

That for the past 20 years it has represented the Democratic party, which is one of the two principal political parties in which the people of Schuyler County are divided. At the time of the last election and during the last presidential campaign, it was the only newspaper in the county of Schuyler which advocated the election of the regular Democratic candidates nominated in, and for the offices to be filled in said county by the regular Democratic party in convention assembled. That said newspaper advocated the election of John Boyd Thacher, Democratic nominee and candidate for governor of the State of New York, nominated by the regular Democratic party in convention assembled at Buffalo, N. Y., in September last, until said John Boyd Thacher resigned and refused to be a candidate for governor upon said Democratic ticket.

That thereafter the said Watkins Democrat advocated the election of Daniel G. Griffin, and F. W. Heinrich, and Spencer Clinton, the nominees of the party known as the "National Democracy," duly nominated by the said party in convention assembled at Brooklyn, N. Y., in September last, as the candidates for the office of governor, lieutenant-governor, and judge of the Court of Appeals, respectively.

That after the National Convention of the Democratic party held at Chicago, Ill., at which William J. Bryan and Arthur Sewell were nominated for the office of president and vice-president respectively, said Watkins Democrat did not advocate the election of the said nominees for the office of president and vice-president, and thereafter advocated the election of no candidates for said office until after the convention of the National Democratic party, held at Indianapolis, Ind., in September last, at which John M. Palmer and Simon B. Buckner were nominated as candidates for said party for the office of president and vice-president respectively; and that after their nomination the said Watkins Democrat published their names at the top of its editorial page as the candidates of said newspaper, and kept the names of said Palmer and Buckner and of all electors duly designated at the Brooklyn convention of said party aforesaid to represent said candidates, and of said Griffin, Heinrich, and Clinton, and of the regular Democratic nominees for the various county offices to be elected at the then ensuing election at the top, and in the first column of its editorial page until the time of such last general election occurring upon the 3d day of November last.

That previous to the last presidential campaign and during the time that the said Watkins Democrat has been published and circulated, it has been a Democratic newspaper and unswerving in its advocacy of the principles enunciated by every Democratic platform, whether State or National.

That said Watkins Democrat now is, and for a period of about one year has been the only newspaper in any manner representing Democratic principles or advocating the election of any Democratic can-

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didates whosoever, except a so-called newspaper known as the Watkins Advocate, which published two issues about the time of the last election and has never published an issue since the last election held upon the 3d day of November, 1896.

That the Watkins Review is a newspaper published and printed in the village of Watkins in the said town, county, and State, and is owned, controlled, edited, and published by John Corbett, now a supervisor of the town of Reading, Schoharie County, N. Y., and elected as such supervisor in February last upon the Republican ticket in said town.

That the said Watkins Review now is and ever since the time of the publication of its first issue in or about the month of February, 1896, has been, a non-partisan publication, and during the campaign last past and hereinbefore referred to has not advocated the election of any candidate whosoever for any office upon any ticket, nor has it at any time whatsoever placed the names of any candidates upon its editorial page, or on any page, as the candidates of the Watkins Review for any office whatsoever, and that in all respects the Watkins Review is a non-partisan paper and does not represent either of the two principal political parties into which the people of the State and county are divided.

That the board of supervisors of the said county of Schuyler now in session at the court-house in the village of Watkins, N. Y., is composed of eight members, five of whom were elected as members of said board upon the Republican ticket, and three of whom were elected as members of said board of supervisors of their respective towns upon the Democratic ticket. All of whom were elected during the month of February, 1896.

That the Democratic members of said board are as follows : (insert names and the wards or towns they represent).

That on the first day of December, 1896, and while acting as members of said board of supervisors, the said (insert name of Democratic members) being a majority of the said Democratic members, designated in writing the Watkins Review as the newspaper fairly representing the Democratic party to which they belonged to publish the session laws and concurrent resolutions of the legislature required by law to be published, and signed the same and filed it with the clerk of the board of supervisors, and a copy thereof is hereto annexed and marked Exhibit A, and forms part of this petition.

That the said Watkins Review does not fairly represent the political party to which the said ——— and ——— belong, and that by said designation great injustice has been done to your petitioner.

That this petitioner is advised that the determination and action of the said ——— and ——— in designating the Watkins Review as one of the newspapers to publish the session laws and concurrent resolutions of the legislature required by law to be published as aforesaid should be reviewed by a writ of *certiorari* and relief granted to him.

That no previous application for a writ of *certiorari* has been made to any court in this matter.

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That hereto attached are copies of the said Watkins Democrat and Watkins Review, and which form part of this petition.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court, directed to said ——— and ——— as such supervisors as aforesaid, commanding them to certify and return to this court all their proceedings and decisions had and made in the premises, together with a record of all proceedings had before them at the time of the said designation of the said newspapers as aforesaid, including all evidence taken by them, to the end that the said designation, determination, and action may be reviewed and corrected on the merits by this honorable court, and that the aforesaid errors committed by them in designating the Watkins Review to publish the session laws and concurrent resolutions of the legislature required by law to be published as aforesaid may be corrected, and that the proceedings had by them as aforesaid may be reversed, modified, and corrected so as to designate the Watkins Democrat as the newspaper to publish in and for the said county of Schuyler the session laws and concurrent resolutions of the legislature required by law to be published as aforesaid. And that your petitioner may have such other and further relief as to the court may seem just, and that all proceedings on account of or by reason of such determination, designation, and action of the said ——— and ——— as such supervisors be stayed until the hearing and determination of the writ of *certiorari* made herein.

WILLIAM H. BALDWIN.

(*Add verification.*)

Petition for Certiorari to Board of Health. (58 Hun, 595.)

To the Supreme Court of the State of New York :

The petition of the New York Central & Hudson River Railroad Company, by H. J. Hayden, a director thereof, respectfully shows to the court :

That your petitioner is a railroad corporation organized under the Laws of the State of New York, and at all the times herein mentioned was and still is lawfully engaged in maintaining and operating the New York Central & Hudson River Railroad, a branch of which crosses Cayuga Lake, in said State of New York, within one mile or thereabouts of the northern end of said lake. The west shore of said lake is in the town of Seneca Falls, in Seneca County.

Said railroad crosses said lake in an easterly and westerly direction upon an earthen road-bed, built out into the lake from each shore a distance of three-fourths of a mile or thereabouts. That it is now engaged in building a bridge extending from the middle portion of the course of said railroad across said lake, which bridge will connect with the earthen embankments extending from the east and west shores. There will be ten open waterways beneath, aggregating 611 feet in length, affording large and ample passage for the water of said lake in its natural course to its outlet towards the north. There is a slight current in the water of said lake, and said bridge will be built over such natural current whereby the natural passage

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of the water of said lake is preserved. That the means for crossing said lake by said railroad upon said earthen road-bed and bridge constructed as aforesaid, and as the same is to be constructed, will not and does not in any degree impede or change the natural course or flow of the waters of said lake, as I am informed and believe.

That _____, _____, and _____, at the time herein mentioned composed the board of health of the town of Seneca Falls.

That, as your petitioner is informed and believes, said persons, or some of them, composing said board of health, without complaint made to or presented to said Board, and without taking any testimony and without evidence presented to them, unwarrantably, unlawfully, and without authority and without notice to your petitioner and without giving your petitioner any opportunity to be heard, issued the papers annexed to the petition and affidavit of your petitioner herein, purporting to be the determination of said board of health, that two openings 100 feet wide should be made in said embankment extending from the west shore of said lake for the passage of water, based upon the conclusion of said persons, or some of them, composing said board, that said embankment and bridge as now constructed or as the same is to be constructed will cause stagnation of water and an accumulation of vegetable matter near the west shore of said lake, next to the said embankment, that is detrimental to public health, by which, in substance, your petitioner is ordered to make two openings in said earthen embankment extending from the west shore of said lake 100 feet wide, and caused said papers to be served upon your petitioner by delivering copies thereof to William Cowin, station agent at Seneca Falls, for your petitioner, and Hon. Chauncey M. Depew, president of the New York Central & Hudson River Railroad Company.

Your petitioner alleges that the alleged determination of said board of health is erroneous in stating that the said embankment and bridge cause stagnation of any portion of the waters of said lake, or the accumulation of decayed matter or unhealthful substance therein, and that said bridge and embankment are the causes contributing to any conditions in the waters in said lake detrimental to public health.

That in fact said embankment and bridge as the same now exist, and as the same will be constructed, will not and do not retard the natural flow of the waters of the said lake, or change or interfere with the same, but the large openings in said bridge do and will fully furnish for the outlet of said waters and afford the means for the passage of a much larger volume of water than ever accumulates in said lake. That the point in said lake mentioned in the proceedings of said board where it is claimed accumulations form, causing stagnation of water, due to the construction of the bridge, is naturally shallow and without current, and there is a tendency to the growth of flag and water plants there, and your petitioner claims that such condition of the water has not been caused or in no way contributed to by said embankments or bridge, but that the same condition would exist if said embankment was removed or if the same had never been built.

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That the action of the persons comprising said board is based upon this conclusion only, unsupportable by evidence or facts. That its said conclusion in its findings and in respect to the condition of the waters mentioned as the cause of such condition are erroneous and contrary to the facts; that the changes and openings in said embankment proposed and ordered by said board would be a great charge and expense to your petitioner, amounting to many thousands of dollars.

That as your petitioner is advised and believes the said proceedings of said board is an attempt to interfere with and destroy the property of the said railroad company without due process of law and without notice to the said company, and without giving it any opportunity to be heard. Said board has issued said determination and proceedings upon the assumption (if the same were issued by said board) that there is a stagnation of water at the point of the lake at its west shore next said embankment, caused by said embankment, or by the construction of the new bridge and approaches thereto, in that vegetable matter and unhealthful substance accumulate there by reason of said embankment and new bridge, and therefore has determined that said openings shall be made. This is an erroneous assumption or conclusion of said board, unsupported by evidence, investigation, or knowledge, and is not a proper or legal basis for its determination issued as aforesaid. And as your petitioner is advised and believes all said proceedings of said board are irregular and not in conformity to law, and in all respects unlawful and unauthorized, null and void, and said board never acquired jurisdiction to make its determination issued and served as aforesaid.

That no previous application for a writ of *certiorari* has been made herein.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court directed to said board of health, commanding it to serve and return to this court all and singular its proceedings, decisions, and actions of said board in the premises, together with all evidence and data, writings, minutes, and memoranda upon which it proceeded or arrived at its determination and conclusion in the premises, to the end that said determination, actions, conclusions, and proceedings of said board may be reviewed and corrected, vacated and set aside and adjudged null and void, and that your petitioner may have such other and further relief as to the court may seem just, and that all proceedings on account of or by reason of said determination of said board be stayed, and that all steps and proceedings on the part of said board or any of its members for opening said embankment or the removal thereof be stayed until the hearing and determination of this writ.

Dated March 11, 1890.

NEW YORK CENTRAL & HUDSON RIVER
RAILROAD COMPANY,

By H. J. HAYDEN,

(Add verification.)

A director thereof.

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Petition for Writ to Commissioner of Fire Department.

(149 N. Y. 549.)

To the Supreme Court of the State of New York :

The petition of Philip E. Miller respectfully shows :

1. That at all the times hereinafter mentioned petitioner was and still is a citizen of the United States of America and a resident and elector of the city of Brooklyn, county of Kings and State of New York.

2. That on or about the 9th day of December, 1890, petitioner was duly appointed a member of the fire department of the city of Brooklyn, to wit, a fireman therein, and thereupon duly qualified and entered upon the discharge of his duties of said office, and continued to perform the same until the 8th day of January, 1895. That your petitioner was a member of Engine Company No. 24 in said department for about two years preceding January 8th, 1895.

3. That on or about the first day of February, 1894, pursuant to law, the Hon. Charles A. Schieren, mayor of the city of Brooklyn, as such appointed Frederick W. Wurster, commissioner of the fire department of the said city of Brooklyn, and said Frederick W. Wurster thereupon duly qualified and entered upon the discharge of the duties of said office, and has continued ever since and still is commissioner of the fire department of the said city of Brooklyn.

4. That on the 8th day of January, 1895, said commissioner irregularly, illegally, and without cause removed your petitioner from said position and membership of said fire department of the city of Brooklyn, as will more fully appear in the proceedings of the said commissioner of the fire department of the city of Brooklyn.

5. That on the 3d day of January, 1895, your petitioner was charged with being intoxicated on the evening of January 2d, 1895, and a trial was had upon said charges before said commissioner on the 8th day of January, 1895, and your petitioner was found guilty thereof by said commissioner and sentenced to dismissal from the fire department of the city of Brooklyn.

6. That the petitioner plead not guilty to said charge, that the only evidence offered in support of said charge was the testimony of Patrick Lahey, foreman, and John Asmus, assistant foreman, of Engine Company No. 24, of the fire department of the city of Brooklyn, who, after being duly sworn, testified that your petitioner was not guilty of such charge. That your petitioner testified before said commissioner in answer to said charge and denied that he was intoxicated as charged and alleged, that on the contrary he was suffering from a severe illness.

7. That on December 30th, 1894, January 1st, and January 2d, 1895, your petitioner was charged with absence without leave from his company's quarters as follows (insert facts on which charges are based), and a trial was had upon said charges before said commissioner on the 8th day of January, 1895, and your petitioner was found guilty thereof by said commissioner. That at the hearing of said charges petitioner admitted his absence from his company's quarters at the times alleged, and stated to said commissioner that

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said absence was caused by reason of your petitioner's sickness and his inability to perform duty during the times specified to said charges (insert petitioner's details of absence with reasons therefor).

8. Your petitioner solemnly swears that on the second day of January, 1895, he did not drink or taste in any form or manner, ale, beer, wine, or liquor of any description.

9. That on the 8th day of January, 1895, said Frederick W. Wurster, commissioner of the fire department of the city of Brooklyn, served upon your petitioner the following decision on the charges preferred against your petitioner (insert copy of commissioner's decision).

10. Your petitioner further says that no charges were pending against him other than those mentioned herein.

Wherefore, your petitioner prays that a writ of *certiorari* issue herein directed to said Frederick W. Wurster, as commissioner of the fire department of the city of Brooklyn, commanding him to return to this honorable court the record of the appointment of your petitioner as a member of the fire department in the city of Brooklyn, the charges preferred against petitioner on the 31st day of December, 1894, January 1st and 3d, all the testimony taken at the hearing on said charges, and all statements made at said hearing by your petitioner, together with all the proceedings touching the removal of petitioner from membership in the fire department of the city of Brooklyn.

And your petitioner will ever pray.

Dated New York, January 24th, 1895.

PHILIP E. MILLER.

(Add verification.)

Affidavit for Writ of Certiorari to Highway Commissioners.

(126 N. Y. 363.)

STATE OF NEW YORK, }
 SUFFOLK COUNTY, } ss. :

John L. Cook and William H. Cook being duly and severally sworn each for himself says, that he is a resident of the town of Southampton, in the county of Suffolk, and liable to be assessed for highway labor therein; that on or about the 14th day of March, 1887, deponents and others made application by petition for a public road or highway in said town commencing at Horse Mill Lane and running in a northeasterly direction until it connected with another road specified in said petition, and a copy of which petition is hereto annexed, and that pursuant to said application a jury was summoned and certified to the necessity of such road; that on or about the 30th day of April, 1887, Egbert Hildreth, Erastus F. Post, and William R. Perring, commissioners of highway of said town of Southampton, made an order laying out a highway in said town, which said order was filed in the town clerk's office on the day of , 1887, and is in words and figures following, except as to the diagram in said order mentioned, to wit (insert order of commissioners laying out road).

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That the said road laid out by said commissioners is not the road applied for by petitioners, or certified by said jury to be necessary, but a different road, varying flagrantly from the one contemplated by deponents as applicants and by said jury as deponents believe.

That the decision of the said jury was in favor of a road running from Horse Mill Lake in a straight line to Watson Lane at a point west of Watson Halsey's house, as appears from the evidence hereto annexed of Robert W. Perry and Dennis H. Raynor, members of the said jury.

That the said commissioners acting upon said petition and certificate laid out a road beginning 70 rods and more east from the point specified in said petition, namely, Horse Mill Lane, and terminating 17 rods west of the point specified in said petition.

That the diagram hereto annexed, marked "A," shows the respective routes of said roads, the one applied for and the one determined and laid out by the said commissioners from their points of beginning to their respective termini, and that both roads are through enclosed, cultivated, or improved lands.

That one of the said highway commissioners, namely Egbert Hildreth, whose name appears subscribed to said order, is the owner of the land through which the said road was laid out, and deponent believes that the line of said road was purposely changed.

That on or about the 3d day of June, 1887, pending an appeal from the determination or order of the said commissioners, referees to hear and determine said appeal were duly appointed by the county judge of Suffolk County, who thereafter heard and determined the same, and delivered and filed their decision on or about the 28th day of March, 1888, affirming the order of said commissioners.

That deponent is informed and believes that said referees affirmed the determination of the said commissioners because in their view they had no power to review the jurisdiction of the said commissioners, but only the question of the necessity of the road applied for, and certified to by the jury.

JOHN L. COOK,
WILLIAM H. COOK.

(Add acknowledgment.)

Precedent for Petition for Writ.

To the Supreme Court of the State New York :

The petition of Louis Bevier, supervisor of the town of Marbletown, in the county of Ulster, respectfully shows to the court :

That heretofore an appeal was taken by said Louis Bevier on behalf of said town of Marbletown, from the decision of the board of supervisors of Ulster County, in the equalization of assessments and the correction of the assessment roll for the year 1885, and such proceedings were taken thereon, that a trial and hearing were had therein by and before the State assessors of the State of New York, James L. Williams, S. N. Wood, and John D. Ellis, Esqs., and after said hearing and trial, said appeal was by the State assessors dismissed.

That a considerable amount of evidence, including a large number

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of exhibits, was taken on said hearing, and that it appeared, by the proof then given, that the said town of Marbletown was entitled to have a large deduction made from its valuation, as corrected by the said board of supervisors, and the amount so deducted placed upon certain towns or cities, and that the failure of the said State assessors to so direct and decide, causes great injustice to be done to said town of Marbletown.

That this petitioner is advised that the determination of said State assessors can be reviewed by a writ of *certiorari*, and relief granted to the said town of Marbletown.

That no previous application for a writ of *certiorari* has been made in this matter.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court, directed to the said State assessors, James L. Williams, S. N. Wood. and John D. Ellis, commanding them to certify and return to this court, all and singular, the proceedings, decisions, and actions of the said State assessors, had and made in the premises, together with the record of the proceedings had before them on the said hearing and trial in this matter, including the evidence (except that in their discretion they may return the substance of the exhibits) and printed arguments submitted to them, to the end that said decision and action of said State assessors may be reviewed and corrected on the merits by this honorable court, and that the aforesaid errors of the said State assessors may be corrected, and that the proceedings had by said State assessors may be so revised, modified, or corrected, so as to direct what amount ought to be deducted from the corrected valuation of said town of Marbletown, as made by said board of supervisors, and to what town, city, or ward the same should be added, and that your petitioner may have such other or further relief as to the court may seem just, and that all the proceedings on account of or by reason of such decisions, by any person, party, body or board, be stayed until the hearing and determination upon this writ.

LOUIS BEVIER,

Supervisor.

(Add verification.)

The usual practice is not to require notice of granting of the writ; this is, however, entirely in the discretion of the court, but notice will only be required in case of doubt as to the law or practice governing the particular case, and in such case, where it is desirable to bring all the facts before the court to aid it in the exercise of discretion as to the granting of the writ, affidavits might be read by the opposing party. This was so before the codification. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Judges of Columbia*, 2 id. 398; *Saratoga & W. R. R. Co. v. McCoy*, 5 How. 378. It is held that it is not generally necessary that notice of application for a *certiorari* should be given. *Matter of Bruni*, 1 Barb. 196; *Matter of Woodbine St.*, 17 Abb. 112; *Garner v. Com-*

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missioners, 10 How. 181. An order to show cause is the usual form of notice, and, it has been held, should always be obtained when the writ is desired to review municipal assessments. *People v. City of Rochester*, 21 Barb. 656; *Albany Water-Works Co. v. Mayor's Court*, 12 Wend. 292; *Ex parte Mayor of Albany*, 23 id. 277. The practice is to dispense with notice under the statute of 1880. *People ex rel. U. & D. R. R. Co. v. Smith*, 24 Hun, 66, 85 N. Y. 628.

Affidavit in Answer to Application for Writ.

SUPREME COURT—KINGS COUNTY.

The People of the State of New York *ex rel.*
Robert Crummey,

agst.

152 N. Y. 217.

George W. Palmer, as Comptroller of the
City of Brooklyn.

COUNTY OF KINGS, }
CITY OF BROOKLYN, } ss. :

George W. Palmer, being duly sworn, says, that he is the comptroller of the city of Brooklyn, the respondent above named; that he has read the affidavit of Robert Crummey, verified the 19th day of January, 1895.

Deponent admits the allegations in folios one and two of said affidavit as to the appointment of relator as assistant warrant clerk in the office of the comptroller of the city of Brooklyn, and that he held such position until the 30th day of January, 1895, or for one month after deponent became comptroller of the city of Brooklyn, and head of the finance department. And further admits that the relator was removed from his position without a trial or hearing, and that the position held by relator was not abolished, and that upon his discharge another person was appointed in his place and performed the duties formerly devolving upon him.

Deponent has no knowledge or information sufficient to form a belief as to the allegations stated in folios three and four of said affidavit.

Deponent denies as set forth in folios six, seven, eight, and nine of said affidavit, that on the 15th day of December, 1895, he received a certificate from relator duly authenticated and certified by the city clerk of Brooklyn, which certificate set forth the volunteer firemen veteran rights of relator, said certificate being the customary certificate given by the Brooklyn Volunteer Firemen's Association to its members, and deponent expressly alleges and charges the fact to be that he never received at any time a communication from relator, and that his address was not No. 149 Newell Street, the address to which the relator deposes the said certificate was sent.

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Deponent further says that he did not know prior to the service upon him in the month of April, 1895, of the papers in the above entitled proceeding, that relator claimed to be a volunteer fireman or to be entitled to any of the privileges of the so-called veteran acts.

Deponent denies the allegations contained in folio nine to the fact that prior to relator's dismissal, he notified the comptroller that he was a member of the volunteer fire department, and as such was entitled to a trial before dismissal; and deponent further alleges that the said relator was discharged within thirty days after deponent's appointment as comptroller, and in accordance with the charter provisions, and at the time of said discharge deponent had no knowledge or notice whatever of the alleged claim of relator.

And further, answering said affidavit, deponent denies the allegations in folio eleven to the fact that relator did not hold a confidential relation to the appointing officer.

Deponent further says that the allegations in folios twelve and thirteen as to the duties performed by relator are absolutely false and untrue, and charges the fact to be that the statements in said affidavit contained concerning the duties of relator are made in order that the court may declare that the position held by him was not confidential in its nature.

Deponent denies, as stated in folio fourteen, that relator's work was routine in its nature and mere perfunctory and clerical.

Deponent denies each allegation contained in folio eighteen concerning the duties performed by relator while in the employ of the department of finance.

Further answering, said affidavit deponent respectfully shows to this court that the relator was not a clerk in the department of finance upon whom devolved the ordinary clerical duties, but that he and those immediately associated with him held positions of trust and confidence, and which only could be filled by those in whom the comptroller has perfect reliance. That it is the duty of the warrant clerk, and his assistant in the office of the comptroller, to receive vouchers, make out warrants for their payment, and then to pay out these warrants to those entitled to them; and that such duties devolved upon the office held by relator, and made it necessary for the occupant thereof to have knowledge of the accounts and finances, a method of receipts and disbursements, of the forms and methods of keeping and rendering accounts, forms of accounts, and pay rolls to be used in the several departments, and knowledge of the various contracts, and of the proper certification and audit of vouchers. That in the absence of the warrant clerk, the assistant warrant clerk was called upon to perform his duties, and bore the same relation to his superior officer as the deputy in a city department does to the head thereof. It was necessary for the relator to draw warrants, and to pay the same over, and to have knowledge of the account to which the warrants were chargeable, and to identify the recipient of the warrant as the one to whom payment should be properly made.

Deponent further says that when the comptroller came into office January 1, 1895, he found that the duties of the office of the relator

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were of such a nature that he had no right or reason to allow them to be performed except by a person he knew, and in whom he had full faith and confidence. He realized that however capable a clerk might be, the position held was such that he might use it to his own advantage, and that if unfaithful to his trust he would have the opportunity of taking moneys from the public treasury. He realized that although the relator may have been a man in whom he could have placed trust, it was his duty to the city, and to his bondsmen, and to himself to discharge relator and place in his position a man whom he knew from his personal experience could be trusted.

Deponent further says that the services of relator were not wholly of a public character, but bore special relation to the comptroller himself.

Deponent further says that the original appointment of the relator, Robert Crummey, was not after a competitive examination, but that the position held by him was in schedule "A" of the Civil Service Regulations, and was not subject to competitive appointment; that the relator was appointed by the comptroller, and that his term of office was the pleasure of the comptroller; that from the time of the original appointment of the said relator to the present time the Civil Service list has not been changed, and that the position formerly held by him, and from which he was discharged, and to which another, upon his discharge, was appointed, is still in schedule "A" and not subject to competitive examination.

Deponent further says that the reason that the position held by the said relator is in schedule "A" is that the position is regarded as one confidential in its nature, and one which could not properly be filled as the result of a competitive examination; that the civil service classifying power believed that the warrant clerks, in the office of the comptroller, department of finance, should be men appointed by the comptroller in accordance with his own pleasure, and therefore the office of warrant clerk was placed in schedule "A" and is not subject to competitive examination.

GEORGE W. PALMER.

(Add verification.)

Precedent for Order to Show Cause why Writ should Not be Granted.

SUPREME COURT.

In the Matter of the Application of Louis Bevier, Supervisor of the Town of Marbletown for a writ of <i>certiorari</i> .	}
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On reading and filing the verified petition of Louis Bevier, praying for a writ of *certiorari* to review the decision of the board of State assessors on an appeal from the equalization made by the supervisors of the county of Ulster, and showing that said town is aggrieved, and that proper grounds exist for the granting of an order to show cause :

Now, on motion of Alvah S. Newcomb, attorney for relator, let the

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board of State assessors (naming them) show cause at a Special Term of this court, to be held at the court-house in the city of Hudson, on the 18th day of May, 1887, at the opening of the court on that day, why a writ of *certiorari* should not be granted to bring up the proceedings of the said board on the hearing of the appeal by the said town of Marbletown, from the equalization made by the board of supervisors of the county of Ulster. Let service be made on or before May 6.

SAMUEL EDWARDS,

Dated May 5, 1887.

Justice Supreme Court.

ARTICLE V.

THE WRIT. § 2129.

§ 2129. To whom writ directed.

The writ must be directed to the body or officer, whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both, if necessary. Where it is brought to review the determination of a board or body, other than a court, if an action would lie against the board or body in its associate or official name, it must be directed to the board or body, by that name; otherwise it must be directed to the members thereof, by their names.

The writ must be directed to all persons whose return is necessary to enable the court to determine the regularity or validity of proceedings of the officer or tribunal sought to be reviewed. Each officer, body, or board can make return as to his part of the matters done. But this is confined to cases where several officers or boards are required to perform separate acts which make up one official transaction, as assessors, commissioners, and county judges, on proceedings for bonding towns. *People v. Hill*, 65 Barb. 170. But on the other hand, where the acts of single officers do not go to make parts of and complete a single transaction, and constitute one entire official act, separate writs must issue to each body or officer whose acts contribute to the completion of the act complained of. *Matter of Woodbine Street*, 17 Abb. 112. *Certiorari* must run to a board of village trustees, and not to the corporation as such, where the action of the trustees is sought to be reviewed. *People v. Trustees*, 1 Hun, 593. It was formerly held that a *certiorari* to a board of police would not run to the individual, but to the board as a body. *People v. Cholwell*, 6 Abb. 151. The writ should run to individual overseers of the poor, and not to them in their official capacity. *Overseers of Greenville v. Bishop*, 2 How. 195. And to correct errors of a board of assessors or revision, *certiorari*

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must run to the board and not to the corporation. *People v. Mayor*, cited in Bliss' Annotated Code under § 2129. Where the writ was against a mere department of the city government, it must be directed to the members of such board by their individual names; so held as to the commissioner of public parks on ground it is not a corporation, and action is not authorized against it in its official capacity. *People v. Commissioners*, 97 N. Y. 37. To review an order of commissioners of highways, directing the removal of an encroachment, it must be directed to the commissioners. *People v. Commissioners of Highways*, 30 N. Y. 72. But *certiorari* directed to different officers having no joint or common duties, but acting independently, is bad. *People v. Walter*, 68 N. Y. 403. A writ to review the proceedings of a judge out of court should be directed to the judge, and not to the court of which he is a member. *People v. Kelly*, 35 Barb. 444. The writ will properly issue to a judge to review proceedings on town bonding, even after the proceedings have been completed and the record filed with the county clerk. *People v. Smith*, 45 N. Y. 772, distinguishing *People v. Commissioners of East Hampton*, 30 id. 72. It is held in *People v. Hill*, 65 Barb. 170, that although ministerial acts enter into and form part of the act complained of, the writ is properly directed to the officer or body so acting, but that the writ does not issue to review purely ministerial acts. The writ may be directed to one whose term of office has expired. *Harris v. Whitney*, 6 How. 175; *People v. Hill*, 65 Barb. 170; *Conover v. Devlin*, 15 How. 470.

It is said in 1 Crary's Special Proceedings, 160, on the authority of Bacon's Abridgment, that when the officer who performed the act was dead, the writ runs to his executor. A *certiorari* to remove the proceedings of three justices, affecting a town officer, must be in the name of the people. *Wildy v. Washburn*, 16 Johns. 49. A *certiorari* will lie in the name of the people on the relation of an individual taxpayer to review an erroneous assessment. *People v. Supervisors of Westchester*, 57 Barb. 377. A party who has no interest in the subject-matter is not entitled to the writ. *Colden v. Botts*, 12 Wend. 234; *People v. Overseers of Berne*, 44 Barb. 467; *Starkweather v. Secley*, 45 id. 164. When the relator attempted to review the proceedings of highway commissioners in laying out a road, by the writ, on the ground that he was an innkeeper whose business would be injured by

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the diversion of travel from the road on which his hotel was located, to the highway laid out, and it appeared that he was in no way a party to the proceeding, and did not own property over which the new highway passed, the writ was not sustained. *People v. Schell*, 5 Lans. 352. A petitioner for the issuing of town bonds may sue out the writ to review the proceeding. *People v. Wagner*, 7 Lans. 467. It has been held that the writ should not be allowed at the instance of an individual to review proceedings for levying a tax which affect a considerable number of persons. *Matter of Fifty-first Street*, 3 Abb. 232. A citizen and taxpayer cannot intervene by *certiorari* to bring up the proceedings in an action between a county and citizens which has been compromised by the parties. *Supervisors v. Bowen*, 4 Lans. 24. A national bank cannot institute proceedings to review an assessment for a tax to be imposed upon the shares of its stockholders. *Merchants' National Bank v. Coleman*, 41 Hun, 344. The writ lies by a former owner of premises sold for taxes to review summary proceedings under city charter, begun by grantee against former owners and tenant, under a tax deed to recover demised premises. *People v. Andrews*, 52 N. Y. 445. When relator dies and by will gives an executor the rents and profits in lands affected by the proceedings, the latter may continue them. *People v. Robinson*, 29 Barb. 77. The writ must run in the name of the people, and cannot be prosecuted in the name of an individual alone. *Wildy v. Washburn*, 16 Johns. 49; *People v. Judges of Suffolk*, 24 Wend. 249. It should recite the names of the parties aggrieved and set forth the cause of complaint with the proceedings, and the wish of the people to be certified of them, and directing the judge or other officer or tribunal to certify and return the record to the Supreme Court at a specified time named therein as the return day of the writ, so that the court may then and there cause to be done what of right ought to be done, and directed to the tribunal whose proceedings are sought to be reviewed. *People v. Cholwell*, 6 Abb. 151. The writ should be tested, signed, and sealed, and an indorsement made upon it signed by the clerk, showing that the writ had issued by order of the court. 2 Burr. Pr. 195; *Mott v. Commissioners of Highways*, 19 Wend. 640.

The order for the writ is the authority for the clerk to sign the indorsement and affix the seal.

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Where a permanent official body is created by statute without any limit as to time, the court may review the decision of such a board, although the individuals who made it have ceased to be officers, and a record of their proceedings has passed into the custody of some other authority. In such a case the person holding the record should be made party to the writ, in order to place the record before the court. *People ex rel. Heiser v. Gilon*, 121 N. Y. 559, 31 St. Rep. 894. If the record of decision which is desired to be reviewed is in the hands of persons other than those making the decision, the writ may, by the authority of § 2129, Code Civil procedure, be sent to any body which has any paper to be certified in relation to the writ. *People ex rel. Cook v. Hildreth*, 5 Supp. 308. Where the writ issues against the common council of the city to review its decision in designating a newspaper for public printing, the mayor of the city is properly made a party, although he had no voice, vote, or veto in the decision, as he was required by the charter of the city to authenticate the acts of the common council. *People ex rel. Francis v. Mead*, 17 St. Rep. 661, 2 Supp. 114. Though § 2136, Code Civil Procedure, provides that *certiorari* may issue against an officer whose term of office has expired, yet where the office is a continuing public office, such as a comptroller of the State, it properly issues to the person incumbent of the office to review the proceedings of his predecessor, under the provisions of § 2129. *Matter of the Tax Commissioners v. Tiffany & Co.*, 80 Hun, 488, 62 St. Rep. 394, 30 Supp. 494. The provision in § 2129, Code Civil Procedure, that the writ may issue to any person having the custody of the record, or other papers to be certified, as well as to the board or persons making the decision to be reviewed, is intended to prevent a failure of justice "through the shuffling of the roll around from one person or officer to another, before its purpose could be made effectual by its service." Thus in reviewing the proceedings of assessors, the town clerk having possession of the assessment-roll is a proper party. *People ex rel. v. Burhans*, 25 Hun, 186.

Where the respondent in *certiorari* is a mere department of the city government, and no action could be brought against it by its official name, a writ directed to such board is irregular; it should be directed to the members of the board "by their names." *People ex rel. R. R. Co. v. Board of Commissioners, etc.*, 97 N. Y.

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43. It seems that the direction of the writ of *certiorari* to persons who composed a majority of the Democratic members of a board of supervisors, which majority made the determination complained of, is not improper under provisions of § 2129. *People ex rel. Baldwin v. Barnes*, 17 App. Div. 202.

It seems that *certiorari* issued to the supervisors of a county commanding them to certify a return of their proceedings in the designation of a paper for the publication of the session laws, may be directed to the persons composing the majority of the members of the board of supervisors. *People ex rel. Baldwin v. Barnes*, 17 App. Div. 202. Where the city department whose decision is sought to be reviewed is an incorporated body, able to sue or be sued in its own name, the writ of *certiorari* properly issues against it, under its corporate name. *People ex rel. Fitzgibbons v. Trustees*, 1 App. Div. 187, distinguishing 97 N. Y. 37, *supra*. Where the body whose decision is to be reviewed is still legal custodian of the record thereof, and has not delivered the same to any other party by virtue of a statute, the writ of *certiorari* lies against it. *People ex rel. N. Y. O. & W. R. R. Co. v. Chapin*, 3 St. Rep. 725, distinguishing *People ex rel. Marsh v. Delaney*, 49 N. Y. 655; *People ex rel. Law v. Commissioners*, 9 Hun, 609; *People ex rel. Weeks v. Supervisors*, 82 N. Y. 275. The writ must be issued under seal of the court, but the omission of the seal does not make the writ void and the defect may be cured by amendment. *People ex rel. H. & M. R. R. Co. v. Assessors of Herkimer*, 6 Civ. Proc. 297. This case arose under the Tax Law.

Precedent for Order for Writ with Stay.

At a Special Term of the Supreme Court of the State of New York, held at the Supreme Court Chambers at the City Hall, in the city of Kingston, county of Ulster, on the 7th day of December, 1886 :

Present :—Hon. Samuel Edwards, *Justice*.

In the Matter of the Application of Louis Bevier, Supervisor of the Town of Marbletown, for a writ of *certiorari* to the Board of Supervisors of Ulster County.

On reading and filing the petition of Louis Bevier, of the said town of Marbletown, the above applicant, verified on the 7th day of De-

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ember, 1886, on motion of A. S. Newcomb, attorney for said applicant, it is

Ordered, that a writ of *certiorari*, as prayed for in the said petition, be issued, directed to the board of supervisors of the county of Ulster.

That said writ be returnable within twenty days after service thereof, at the office of the clerk of the Supreme Court in and for Ulster County, in the city of Kingston, and that said writ be allowed and signed and sealed by the clerk of this court.

The court hereby, in its discretion, dispenses with notice of the application for the writ in this matter.

It is further ordered that the execution of the determination by said board of supervisors to impose, levy, and assess upon the taxable property of said town of Marbletown, and collect from said town the sum of \$3,109.81, to apply toward the payment of the alleged costs and expenses of said board of supervisors as respondents in appeals by the said town of Marbletown and the city of Kingston, to the State assessors of the State of New York, from the decision of said board in the equalization and correction of the assessment-rolls of the different towns in said county of Ulster, and the said city of Kingston, in the year 1885, be stayed, and the said board of supervisors is hereby restrained and enjoined from imposing, levying, or collecting said sum, or inserting the same in the tax-roll of said town of Marbletown for the purpose aforesaid, and said board of supervisors are further restrained and enjoined from inserting in the tax-roll of said town, or levying or assessing any sum upon the taxable property of said town, for the costs or expenses of the respondent on said appeal, pending this *certiorari*, or until the further order of this court.

That the relator, being a public officer, and the writ issuing on behalf of a municipal corporation, no security is required.

Enter in Ulster County.

SAMUEL EDWARDS,

Justice Supreme Court.

Order for Writ of Certiorari.

At a Special Term of the Supreme Court, held in and for the county of Kings, at the county court house, in the city of Brooklyn, on the 25th day of January, 1895:

Present:—Hon. William J. Gaynor, *Justice.*

People *ex rel.* Philip E. Miller,

agst.

Frederick W. Wurster, Commissioner of the
Fire Department of the City of Brooklyn.

149 N. Y. 549.

On reading and filing the annexed petition of Philip E. Miller, verified the 24th day of January, 1895, and the affidavit of Margaret Miller, sworn to the 24th day of January, 1895, and on motion of Edward F. O'Dwyer, attorney for the relator, it is

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Ordered, that a writ of *certiorari* issue out of and under the seal of this court, directed to said Frederick W. Wurster, commissioner of the fire department of the city of Brooklyn, as prayed for in the said petition.

Enter.

Granted Jan. 25th, 1893.

W. J. G.,

J. S. C.

HENRY C. SAFFEN,

Clerk.

Order Granting Writ.

In the Matter of the Application of the People of the State of New York by the Forest Commission, and the Forest Commission for a Writ of *Certiorari* to Hon. Frank Campbell, Comptroller of the State of New York. } 152 N. Y. 56.

On reading and filing the petition of the People of the State of New York, by the Forest Commission of the State of New York, and of the said Forest Commission, duly verified by William P. Cantwell, the attorney for the said People and for the said Forest Commission, which verification was made on the 19th day of April, 1892, and on motion of William P. Cantwell, the said attorney of said petitioner, it is

Ordered, that a writ of *certiorari* as prayed for in said petition be issued directed to Hon. Frank Campbell, Comptroller of the State of New York; and that said writ be allowed, signed, and sealed by the clerk of this court in and for the county of Albany. The court hereby, in its discretion, dispenses with notice of the application for the writ in this matter.

Enter in Albany County.

JOHN R. PUTNAM,

J. S. C.

WM. P. CANTWELL,
Attorney for Petitioners,
Malone, N. Y.

Order with Stay.

At a Special Term of the Supreme Court of the State of New York, held at Albany, in the city of Albany, county of Albany, on the 15th day of September, 1887:

Present:—Hon. C. R. Ingalls, *Justice*.

In the Matter of the Application of Charles G. Burnham, for a Writ of *Certiorari* to Edward F. Jones and others, Commissioners of the Land Office. } 112 N. Y. 618.

On reading and filing the petition of Charles G. Burnham, of the city of New York, the above application, verified on the 15th day of

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December, 1887, and on motion of Morgan & French, attorneys for the said applicant, it is

Ordered, that a writ of *certiorari*, as prayed for in the said petition, be issued, directed to Edward F. Jones, James W. Husted, Frederick Cook, Alfred C. Chapin, Lawrence J. Fitzgerald, Denis O'Brien, and Elnathan Sweet, Commissioners of the Land Office; that said writ be returnable within twenty (20) days after service thereof, at the office of the clerk of the Supreme Court in and for the county of Albany, in the city of Albany, and that said writ be allowed and signed and sealed by the clerk of this court. The court hereby dispenses with notice for application of the writ in this matter.

It is further ordered, that the execution of the determination by said Commissioners of the Land Office, to make the grant applied for by the Bartholomay Brewing Company and referred to in the annexed petition, be and it hereby is stayed, and the said commissioners above named are hereby severally restrained and enjoined from executing or delivering patent, deed, or grant, by way of quit-claim or otherwise, to the said Bartholomay Brewing Company, of the land under water described in the annexed petition in front of and adjacent to the premises claimed by the said petitioner pending this *certiorari*, or until the further order of this court.

ROBERT H. MOORE,
Clerk.

(Certification.)

Precedent for Writ.

The People of the State of New York, on the relation of LOUIS BEVIER, Supervisor of the town of Marbletown, to the Board of Supervisors of the County of Ulster :

WHEREAS, We have been informed by the petition of Louis Bevier, as such supervisor, verified the 7th day of December, 1886, that the said town of Marbletown and the city of Kingston, which is also located in said county of Ulster, did each, in the year 1885, take an appeal to the State assessors of the State of New York, from the decision of the board of supervisors of the county of Ulster, in the equalization and correction of the assessment-rolls of the different towns of said county, and of the said city, for the year 1885, and such proceedings were had in said appeals that the same have been dismissed by the State assessors.

That at the annual session of the board of supervisors of the county of Ulster, for the year 1886, the said board fixed and determined and audited the amount of costs and expenses of said board, as respondent on said appeal, at the sum of \$21,446.99, and further determined to levy and assess such amount as follows: \$18,337.98 on taxable property of said city, and \$3,109.81 upon the taxable property of said town of Marbletown.

That injustice has been done said town of Marbletown in that the whole of said costs and expenses have been assessed on said town and city, and in that said costs and expenses are largely made up of items which are not legal costs or expenses, and which cannot be

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legally collected by said respondents on said appeal, against or from said town of Marbletown.

That said petition, among other things, prays that a writ of *certiorari* issue out of this court to bring up the proceedings had by and before the said board of supervisors in reference to said costs and expenses, and the audit thereof, and the items composing the same, and the assessment thereof upon said city and town of Marbletown, to the end that the same might be reviewed, and the error so alleged might be corrected, and the said town of Marbletown might be relieved from the payment of anything more than its proper proportion of said costs and expenses, or from the payment of any portion thereof which is not legal costs and expenses, and for any further or other relief, as may be just and proper.

We, being willing to be certified of your proceedings as such board of supervisors in making audit of such costs and expenses, and in assessing the same, and in all things relating thereto, do command you, that within twenty days after the service hereof upon you, you do certify and return to us, at the office of the clerk of the county of Ulster, all and singular your proceedings, decisions, and actions, in the premises, with the dates thereof, and all and singular the evidence, documents, records, claims, bills, or papers before you, or which were submitted to you, concerning the said matter, and all the resolutions, protests, affidavits, and papers offered to or filed with you as such board, in relation thereto, with the rulings or decisions of said board, or its chairman, including the corrected valuation of the real estate as equalized in said city and town of Marbletown for the years 1885 and 1886, and also the amount of personal property assessed in said city and town of Marbletown by said board for said years, and all action in relation thereto sustained by said board, to the end that said decisions and actions of said board may be reviewed and corrected on the merits by this court, and the aforesaid error of said board may be corrected according to law, and that the said action or determination, audit or allowance, may be reviewed or corrected according to law, as to the court may seem just.

Witness, Hon. Samuel Edwards, one of the justices of the [L. s.] Supreme Court, at the city hall, in the city of Kingston, on the 7th day of December, 1886.

A. S. NEWCOMB,

Attorney for Relator.

(Indorse allowance of writ by judge granting it.)

JACOB D. WURTS,

County Clerk.

Writ.

The People of the State of New York, on the relation of Charles G. Burnham, of the City of New York, to Edward F. Jones, James W. Husted, Frederick Cook, Alfred C. Chapin, Lawrence J. Fitzgerald, Denis O'Brien, and Elnathan Sweet, Commissioners of the Land Office.

112 N. Y. 618.

WHEREAS, we have been informed by the petition of Charles G.

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Burnham, verified on the 15th day of December, 1887, that a hearing has been had heretofore before you, as Commissioner of the Land Office, upon a certain application by the Bartholomay Brewing Company for a grant of lands under the waters of Lake Ontario, adjacent to and in front of certain premises in the village of Charlotte, county of Monroe and State of New York, and that the said Charles G. Burnham appeared upon the said hearing and duly objected to the issuing of the said grant in form and to the extent applied for, on the ground that the said application covered lands under the water in front of and adjacent to premises owned in fee-simple by said Charles G. Burnham, and of which lands the said Bartholomay Brewing Company was not the owner, and after hearing the parties and after maps, certified copies of deeds, original deeds, exhibits, and other papers and evidences had been submitted, the said application of the said Bartholomay Brewing Company was granted, and that injustice thereby has been done to the petitioner, in that lands under water in front of and adjacent to the premises of which the petitioner is the sole owner in fee-simple, have been, or are about to be, granted to the Bartholomay Brewing Company in violation of the law and of the rights of the said petitioner; and the said petitioner, among other things, prays that a writ of *certiorari* issue out of this court to bring up the proceedings had by and before you as to said commissioners in reference to the subject-matter, to the end that the same might be reviewed and the errors so alleged might be corrected, or for any other or further relief as may be just and proper.

We being willing to be certified of your proceedings as such commissioners, in making the determination to grant the application of the said Bartholomay Brewing Company as aforesaid, and in all things relating thereto, we do command you that within twenty (20) days after the service thereof upon you, you do certify a return to us at the office of the clerk of the county of Albany, in the city of Albany, all and singular your proceedings, decisions, and actions in the premises, with the dates thereof, and all and singular the evidence, documents, records, deeds, maps, and all other papers before you or which were submitted to you concerning the said matter, or papers offered or filed with you as such commissioners in relation thereto, with your determination as said commissioners, to the end that your said decisions and actions as said commissioners may be reviewed and corrected on the merits by this court; and that the aforesaid error of said commissioners may be corrected according to law, and that the said action or determination of the said commissioners may be reviewed or corrected according to law as to the court may seem just.

Witness, the Hon. Charles R. Ingalls, one of the justices of the Supreme Court, at the court-house, in the city of Albany,
[L. s.] on the 15th day of December, 1887.

ROBERT H. MOORE,

(Indorse allowance by judge.)

Clerk.

A *certiorari* to review the proceedings of tax commissioners should not require the return of records not affecting the par-

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ticular property of relator. Facts affecting other property, relied on to show disproportionate valuation, should be left to be established by evidence. *People v. Tax Commissioners*, 10 Abb. N. C. 35. It is too late to obtain a writ of *certiorari* against a board of supervisors to review their proceedings in allowing a claim alleged to be illegal, if the warrant for the collection of taxes has been signed, and the money collected. *People v. Supervisors of Rensselaer*, 34 Hun, 266. The writ will not issue to review the determination of canal appraisers by one whose property has been taken. The remedy is by a hearing before the canal board. *People v. Dennison*, 28 Hun, 328.

ARTICLE VI.

PROCEEDINGS UPON THE WRIT. §§ 2132, 2130, 2131, 2137.

§ 2132. When and where writ returnable.

A writ of *certiorari* must be made returnable, within twenty days after the service thereof, at the office of the clerk of the court. If it was issued from the Supreme Court, it must be made returnable at the office of the clerk of the county designated therein, wherein the determination to be reviewed was made; and if the county designated in the writ is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county where the writ is made returnable by the amendment.

§ 2130. Mode of Service.

A writ of *certiorari* must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served upon each officer or other person, to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the Supreme Court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in § 2071 of this act, for service, upon a like board or body, of an alternative writ or mandamus.

See § 2071; 2 R. S. 602, § 68 (2 Edm. 625), and 2 R. S. 599, § 45 (2 Edm. 621).

§ 2131. Stay of proceedings.

Except as prescribed in this section, a writ of *certiorari* does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may in its discretion, and upon such terms, as to the security or otherwise as justice requires, direct by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the *certiorari*, and until the further direction of the court. A bond,

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undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted as a party to the special proceeding, as prescribed in § 2137 of this act.

§ 2137. [Am'd, 1895.] **When third person may be brought in.**

Upon the application of a person, specially and beneficially interested in upholding the determination to be reviewed, the court may, in its discretion, admit him as a party defendant in the special proceedings, upon such terms as justice requires. And a term of the appellate division of the Supreme Court, at which the cause is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person, in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.

NOTE.—In proceedings to review assessments under chap. 269, Laws 1880, the return of the writ and all other proceedings must be in compliance with the statute, and not according to the practice under the common-law *certiorari*, as set forth in the Code Civil Procedure. *Pco. ex rel. N. Y. & R. R. Co. v. Low*, 40 Hun, 177.

It is said in *Mott v. Commissioners*, 19 Wend. 640, that a copy of the order allowing the writ should be served with it, or there should be an indorsement that it is allowed, but that error in that respect may be amended. The proper practice, and that universally adopted, is to have the writ indorsed in form given in precedent. The simple and usual custom is to have two or more writs signed by clerk and sealed, one for service, the other as a duplicate original to be retained by the attorney, although this, of course, is not necessary. It was also held, in *People v. Perry*, 16 Hun, 461, that a copy of the affidavit on which a writ is granted need not be served on respondent. In this respect, however, the usual practice is to serve a copy of the affidavit together with a copy of the order granting the writ, and the writ itself, thus giving the respondent copies of all the papers in the matter.

While § 2131 provides for a stay of proceedings on the common-law writ of *certiorari*, yet this section has no application in proceedings under the statutory writ to review an assessment under Laws 1880, chap. 269, which act by § 2 declares that "A writ of *certiorari* allowed under this act shall not stay the proceedings of the assessors, or other persons to whom it is directed, or to whom the assessment-roll may be delivered, to be acted upon according to law." *People v. Coleman*, 48 Hun 604, 1 Supp. 112, 16 St. Rep. 135, citing *People v. Assessors of Greenburg*, 106 N. Y. 671; see, also, *People ex rel. N. Y., etc., R. C. Co. v. Board of Aldermen*, 10 Abb. N. C. 33.

Section 2131, Code Civil Procedure, providing for a stay of pro-

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ceedings under the determination sought to be reviewed, seems to require that such order for stay should accompany the writ, and be a part of it. It seems that it will be refused where much time has elapsed since the issuance of the writ. *People ex rel. N. Y., etc., R. R. Co. v. Board of Aldermen*, 10 Abb. N. C. 34. Staying of proceedings by separate order was affirmed on appeal in *People ex rel. Burhans v. Supervisors*, 19 Week. Dig. 208. The writ does not operate *per se* as a stay. *People v. Supervisors of Albany*, 23 Week. Dig. 568.

Precedent for Order Staying Proceedings.

At a Special Term of the Supreme Court, held at the City Hall, etc.,
December 1, 1886:

Present:—Hon. Samuel Edwards, *Justice*.

SUPREME COURT.

The People of the State of New York *ex rel.*
Louis Bevier

agst.

James L. Williams, S. N. Wood, and John D.
Ellis, State Assessors of the State of New York.

On reading and filing the petition of Louis Bevier, the applicant for a writ of *certiorari* to the above-named defendants, verified December 1, 1883, and on granting an order for said writ, it is ordered that the Board of Supervisors of the county of Ulster be stayed from inserting in the tax-roll and levying on the town of Marbletown any sum for costs and expenses incurred on the appeal from the equalization made by the said board in 1885, taken by said town of Marbletown, until the determination of the proceeding granted and allowed, as hereinbefore set forth, or from in any wise enforcing the collection of such sum, or any part thereof, or any of the expenses of said appeal which have been taxed at \$4,250, until such hearing and determination on said writ. This order is on condition that the relator herein bring on this cause for hearing at the next General Term of this court, to be held at the city of Albany on the 25th day of January next, unless the hearing shall be postponed by the court.

SAMUEL EDWARDS,

Enter in Ulster County.

Justice Supreme Court.

A motion to quash a writ of *certiorari* can only be made in the district where the writ is returnable, or in a county adjoining the district. *People v. Cooper*, 57 How. 463.

After having obtained jurisdiction of a *certiorari*, it is discretionary for the Supreme Court to quash the writ or remand

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the same on cause shown, or to proceed to its disposition, and an order refusing to quash is not appealable to the Court of Appeals. *Jones v. People*, 9 Week. Dig. 254 (Ct. of App.). Where, after return made, the court is satisfied that the writ was improvidently granted, or that justice and equity or a regard to considerations of public policy require, it will be dismissed without passing on the questions intended to be raised. *People v. Common Council*, 65 Barb. 9. If improper parties are joined or errors assigned not warranted by the record, such part of the proceedings as are illegal may be quashed or corrected, and the rest affirmed if they are independent of each other. *People v. Supervisors*, 57 Barb. 377. A motion to quash can, as a rule, be made only after return. *People v. Cooper*, 57 How. 463; *Clark v. Lawrence*, 1 Cow. 48. But where a notice of motion was to quash and supersede, it was held the writ might be superseded before return. *Saratoga & Wash. R. R. Co. v. McCoy*, 5 How. 378; *Ferguson v. Jones*, 12 Wend. 241. A decision quashing a *certiorari* for errors appearing upon the face of the writ and not upon the merits cannot be reviewed by writ of error. *People v. Mayor*, 1 How. 90. Where the writ appeared to have been granted at Special Term, the contrary will not be allowed to be shown by affidavit on a motion to quash. *People v. Supervisors of Ulster*, 19 Week. Dig. 208. A motion may be made to supersede the writ if it was improperly issued; also, if not properly directed or is otherwise bad in law, it will be superseded. *Devlin v. Platt*, 20 How. 167; *Ball v. Warren*, 16 id. 379. Or where the writ has been granted to remove or review a proceeding before it is terminated, the writ will be superseded. *People v. Peabody*, 5 Abb. 194; *Comstock v. Porter*, 5 Wend. 98. But the writ cannot be quashed till after return, but it may be then quashed where it was prematurely issued or allowed by an officer having no jurisdiction to allow it, or on the application of a party not in interest, or where improperly allowed for any reason. *People v. Peabody*, 26 Barb. 437; *Devlin v. Platt*, 20 How. 167; *Caledonian Co. v. Trustees*, 7 Wend. 665; *Colden v. Botts*, 12 id. 234; *People v. Stryker*, 24 Barb. 650; *People v. Supervisors*, 15 Wend. 198; *People v. Mayor*, 2 Hill, 14; *Brown v. Wesson*, 1 How. 141; *People v. Overseers*, 44 Barb. 467; *People v. Supervisors*, 57 id. 377; *People v. Delaney*, 49 N. Y. 655; *Starkweather v. Seeley*, 45 Barb. 165; *People v. Schell*, 5 Lans. 352. The court will quash

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the writ if improperly allowed, even though a hearing has been had on the merits. *People ex rel. v. Stillwell*, 19 N. Y. 531; *People ex rel. v. Mayor*, 2 Hill, 9; *People v. Commissioners*, 103 N. Y. 371. Writ will be quashed where issued to require determination of assessors after roll has left their hands. *People v. Assessors*, 40 Hun, 228. In *People v. Supervisors of Rensselaer*, 34 Hun, 266, following *People v. Supervisors of Queens*, 82 N. Y. 275, it was held where a board of supervisors had audited a claim and signed the tax-roll, and then adjourned *sin die*, that the board could not be required to make return to a writ of *certiorari* as to their proceedings, and that the writ should be quashed, as the board had no power over the matter after the roll had been signed and warrant delivered.

The same rule was held in *People v. Common Council*, 38 Hun, 7, it being said that as the writ had gone into the hands of a mere ministerial officer, and out of the control of those officers who had any judicial control or quasi-judicial control over it, and the defect was not cured by the fact that a return was made, the remedy was by an action for damages, and the writ must be quashed. Where a board of supervisors had issued its warrant to the collector before the issuing of the writ, *held*, that it was too late and the writ should be quashed. *People v. Supervisors*, 82 N. Y. 275; see *People v. Supervisors of Albany*, 23 Week. Dig. 568; *People v. Tompkins*, 40 Hun, 238. An order quashing a common-law *certiorari* is not appealable to the Court of Appeals. *People v. Commissioners*, 3 State Rep. 615.

Order of General Term Quashing Writ.

At a General Term of the Supreme Court for the Third Judicial Department, held at the City Hall, in the city of Albany, N. Y., on the 4th day of December, 1894:

Present:—Hon. Stephen L. Mayham, *Presiding Justice*; Hon. John R. Putnam, Hon. D. Cady Herrick, *JJ.*

The People *ex rel.* The Forest Commission,

agst.

Frank Campbell, Comptroller.

} 152 NY. 56.

The above entitled proceeding coming on for argument, and the same having been argued at the September Term of this court on the writ of

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certiorari issued herein, the papers on which the same was granted, and the return of the comptroller thereto, and the defendant having made and filed a motion to quash the said writ, and the relator having read and filed in opposition thereto, the appointment of attorney and authorization of proceeding with approval of comptroller and attorney-general, dated January 26th, 1892; defendant's notice of appearance herein dated on or about May 12th, 1892: stipulation as to settlement of return and stipulation as to argument, May Term, 1894: now, after hearing Mr. Frank E. Smith, of counsel for defendant, in support of said motion, and Mr. William P. Cantwell, of counsel for the relator, in opposition thereto, and due deliberation had thereon, and on motion of Weeds, Smith & Conway, attorneys for the defendant, it is

Ordered, that said writ of *certiorari* issued herein, be, and the same is, quashed with fifty dollars costs, and printing disbursements to be taxed by the clerk of Albany County, on the ground that the relator, the Forest Commission, has no power or authority in a case like this to obtain or prosecute such writ.

JAS. D. WELCH,

Clerk.

While § 2137, Code Civ. Proc., permits a party interested in upholding the decision under review to be brought in as a party defendant, yet where such party has not been brought in, he has no right to appeal from the decision of the court. His interests are protected by the appeal of the other respondents; though it seems that such party could be heard upon appeal by permission of the court. *People ex rel. Burnhams v. Jones*, 110 N. Y. 511. The provisions of § 2137 are permissive, and it seems that parties must avail themselves thereof in order to be heard. *People ex rel. Francis v. Mead*, 17 St. Rep. 665, 2 Supp. 117. The party can only be brought in as a party to the writ of *certiorari* by the court before which the writ is brought to a hearing. It cannot be done upon appeal. When proceedings instituted under the Highway Law resulted in laying out the highway, the petitioner in such proceedings to lay out the highway is the proper party to be brought in on the review of such proceeding by *certiorari*. On the contrary the highway commissioners of the town are not the proper parties, though the town itself may be made a party, and such highway commissioner may be the proper officer to make application for bringing in the town. *People ex rel. D. L. & W. R. Co. v. County Court*, 92 Hun, 14.

A writ of *certiorari* must be addressed to the board of assessors, or to all the members of the board, and not merely to those who signed the roll. *Pco. ex rel. Benedict v. Roe*, 25 App. Div. 107, 49 Supp. 227, 83 St. Rep. 227.

ARTICLE VII.

RETURN TO WRIT AND PROCEEDINGS THEREON. §§ 2133,
2134, 2135, 2136, 2139.

§ 2133. Subsequent proceedings as in an action.

After a writ of *certiorari* has been issued, the time to make a return thereto may be enlarged, or any other order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable.

§ 2134. Return; when and how made.

The clerk with whom a writ of *certiorari* is filed, and each person, upon whom a writ of *certiorari* is served as prescribed in § 2130 of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with a transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matter, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.

2 R. S. 599, §§ 45 and 46 (2 Edm. 621).

§ 2135. Id.; how compelled; fees for making.

If a return is defective, the court may direct a further return. An omission to make a return, as required by a writ of *certiorari*, or by an order for a further return, may be punished, as a contempt of the court. But a judge or a clerk shall not be thus punished, unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and, in addition, ten cents for each folio of the copies of papers required to be returned.

See 2 R. S. 576, § 83 (2 Edm. 596), and § 2005.

§ 2136. Id.; after term of office expired.

A writ of *certiorari* may be issued to, and a return to a writ of *certiorari* may be made by, an officer, whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ, as required thereby; or to make a further return, as required by an order for that purpose.

§ 2139. Id.; upon affidavits.

If the officer or other person, whose duty it is to make a return, dies, absconds, removes from the State, or becomes insane, after the writ is issued, and before making a return, or after making an insufficient return; and it appears that there is no other officer or person, from whom a sufficient return can be procured by means of a new *certiorari*; the court may, in its discretion, permit affidavits, or other written proofs, relating to the matters not sufficiently returned, to be produced, and may hear the cause accordingly. The court may also, in its discretion, permit either party to produce affidavits, or other written proofs, relating to any alleged error of fact, or any other question of fact, which is essential to the jurisdiction of the body or officer, to make the determination to be reviewed, where the facts, in relation thereto, are not sufficiently stated in the return, and the court is satisfied that they cannot be made to appear, by means of an order for a further return.

While § 2133, Code Civil Procedure, would seem to give statutory authority for reviewing *certiorari* proceedings, yet *certiorari*,

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being a special proceeding, abates upon the death of the petitioner, and therefore proceedings to vacate an assessment were held not to be reviewable in the name of the executor after the death of the petitioner. *Matter of Barney*, 53 Hun, 481, 6 Supp. 401. A return to a writ of *certiorari* need not be under the seal of the court, body, or officer making it. *Scott v. Rushman*, 1 Cow. 212. And the return should be made by a majority of the board to whom the writ is directed. *People v. Cholwell*, 6 Abb. 151. And it should be made by the officer to whom it is addressed, even though his term of office has expired. *People v. Peabody*, 6 Abb. 228; *Harris v. Whitney*, 6 How. 175. If the return contains matters inserted by way of explanation or otherwise, besides what is ordered to be returned, such matter is irrelevant and is not to be regarded, and the same is true of matters asserted merely as matters of belief or information, and not as a fact. *People v. Mayor*, 2 Hill, 9; *Leroy v. Mayor*, 20 Johns. 430; *Lawton v. Commissioners*, 2 Cal. 179; *Stone v. Mayor of New York*, 25 Wend. 157.

An officer to whom a writ of *certiorari* is directed is only called upon to make return as to the matter specified in the writ. His return is conclusive as to the facts, and cannot be contradicted; it must be taken as conclusive and acted upon as if true. *People v. Dains*, 38 Hun, 43. The following cases are upon the point as to what is brought up by the writ, and discuss the question as to whether the evidence must be returned. They relate largely to the review of questions of jurisdiction only on common-law *certiorari* before the present Code, and they must now be examined by the practitioner in connection with § 2140, which enumerates the questions which may be now reviewed on *certiorari*, and renders many of the cases heretofore in point partially or entirely obsolete. It has been thought better to cite the cases bearing on the question than to attempt to decide as to those which conflict with the section, and leave the matter open to examination on the authorities cited, and the provisions of the Code. Even among the cases before the Code much conflict had arisen, as will appear by the following citations: *Rathbun v. Sawyer*, 15 Wend. 451; *People ex rel. v. Goodwin*, 1 Seld. 568; *People v. Board of Police*, 16 Abb. 337; *People v. Mayor*, 2 Hill, 9; *People v. Van Alstyne*, 32 Barb. 132; *Stone v. Mayor*, 25 Wend. 168; *People v. Overseers*, 15 Barb. 287; *Starr v. Trustees*,

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6 Wend. 564; *Ex parte Mayor of Albany*, 23 id. 280; *Niblo v. Post's Administrators*, 25 id. 280; *Benjamin v. Benjamin*, 1 Seld. 383; *Morewood v. Hollister*, 2 id. 309; *People v. Goodwin*, 5 N. Y. 568; *People v. Knowles*, 47 id. 415. Affidavits and other papers not a part of the proceedings are not properly before the court, only the record can be proceeded on. *Matter of Eightieth Street*, 16 Abb. 169; *People v. Burton*, 65 N. Y. 452. It was, however, settled before the Code that the return should contain so much of the evidence as was necessary to present the question of law on which relator relied. *Baldwin v. City of Buffalo*, 35 N. Y. 375. And that, where the jurisdiction of the inferior courts depends on a fact to be proved before itself, the proof of such jurisdictional facts should be returned to enable the higher court to determine whether the fact was established. *People v. Knowles*, 47 N. Y. 415. And the evidence necessary to show a fact essential to jurisdiction would not be assumed. *People v. Soper*, 7 N. Y. 428. The record itself is sent up. It being called a copy in the return does not affect it. *Wolfe v. Horton*, 3 Cai. 86. *Certiorari* brings up the record and the proceedings to and including, but not subsequent to, judgment. *Gill v. People*, 3 Hun, 187, affirmed, 60 N. Y. 643. The writ only brings up such proceedings as remain before the body to whom it is directed. *People v. Supervisors*, 15 Wend. 198; *People v. Supervisors*, 1 Hill, 185. A *certiorari* to one officer does not bring up a proceeding had in the same matter before a different officer. *Fitch v. Commissioners*, 22 Wend. 132; *Mott v. Commissioners*, 2 Hill, 472. An officer to whom a writ of *certiorari* has been issued is only required to make return as to the matters specified in the writ. The hearing must be on the writ and return. The papers on which the writ was issued can be considered only in determining the question as to the jurisdiction of the court to issue it, and possibly as establishing as facts such matters as were embraced in the writ and omitted from the return. *People v. Dains*, 38 Hun, 43; *People v. French*, 25 id. 111. The court cannot consider affidavits tending to show that the return is false, nor refer it to a referee to ascertain the truth. Remedy is only by an action for a false return. *People v. Mayor of Syracuse*, 6 Hun, 652; *People v. Ryken*, id. 625. The return to a writ of *certiorari* must be taken as conclusive and acted upon as true; if false in fact the remedy is by an action for a false return. *People v. Fire*

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Commissioners, 73 N. Y. 437. This rule is modified by a statute in case of *certiorari* to review assessments. Chap. 269, Laws 1880.

When the Court of Appeals has made an order for the re-assessment of the property of a corporation, the Supreme Court may require the commissioners of taxes to return their proceedings, although the tax-books have been delivered to the board of aldermen for fifteen days. *People ex rel. Manhattan R. Co. v. Barker*, 17 Misc. 497, 41 Supp. 236. If the return to the writ does not deny the statements of the relators, those statements must be regarded as true. *People ex rel. C. T. & E. S. Co. v. Barker*, 7 App. Div. 27, 39 Supp. 776. The return of a comptroller should state the facts upon which he valued the stock of a corporation at par value. *People ex rel. S. I. R. T. R. R. Co. v. Roberts*, 4 App. Div. 334, 74 St. Rep. 107, 38 Supp. 724; and where tax commissioners have rejected the sworn statements of a corporation, their return should state the information on which they acted in doing so. *People ex rel. I. R. & G. P. Co. v. Barker*, 16 Misc. 252, 39 Supp. 88; and likewise the return of police commissioners should state the evidence specifically which they considered in determining the guilt of an officer whom they had discharged. *People ex rel. Simmermyer v. Roosevelt*, 2 App. Div. 498, 74 St. Rep. 430, 37 Supp. 1083. Although the return does not state that the witnesses were sworn, where it does state that the charges against the policeman were duly tried, heard, and examined in the manner required by law, and by the rules of the department, the swearing of witnesses will be presumed. *People ex rel. Killilea v. Roosevelt*, 7 App. Div. 308, 40 Supp. 117. The return of a board of assessors cannot be required to give a bill of particulars of the items composing their award of damages sustained by property owners by a change of grade under Laws 1872, chap. 729, nor are they required to state the method by which they have arrived at their conclusion. *People ex rel. Heiser v. Gillon*, 51 St. Rep. 825, 22 Supp. 238.

It has been held that § 2134 providing when and how the returns to the writ of *certiorari* is to be made does not require that such return shall be verified. *People ex rel. Updyke v. Gillon*, 18 Civ. Pro. 111, 9 Supp. 244. The return should, in addition to the transcript of the record or proceedings, state the whole truth in respect to the other matters specified in and required by the writ, and in the absence of any motion to correct or supply its

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defects, under § 2135, Code Civil Procedure, the presumption is conclusive that it does so. *People ex rel. Gage v. Lohnas*, 54 Hun, 608, 28 St. Rep. 248, 8 Supp. 106. The office of the writ is to compel the body or officer whose proceedings are under review to make a return of the proceedings and a statement of other matters specified in, and required by, the writ. *Beardslee v. Dolge*, 62 St. Rep. 190. The general statutory writ brings up both record and proceedings for examination, not only as to jurisdiction and method of procedure, but also as to whether there was a violation of any rule of law, or any competent proof of all essential facts, or a preponderance of proof against the existence of any of those facts. *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 430. The statutory writ to review assessment (Laws 1880, ch. 296) differs from the common-law writ, in that it permits a redetermination of all questions of fact upon evidence taken in part at least by the Special Term, or under its direction. *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 431.

The opinion of counsel on questions submitted to them by a board of assessors in regard to such assessment should not form part of the return to the writ. *People ex rel. v. Gillon*, 56 Hun, 641, 9 Supp. 690, 942. Where a relator, holding a public office, is entitled to be informed of the cause of his removal before being removed, a communication to him by the board removing him, calling his attention to the charges, should be added to the return by order, if the same be omitted. *People ex rel. v. Myers*, 55 Hun, 608, 8 Supp. 555.

Though the return to the common-law writ of *certiorari* must be taken to be true, it should be noted that in the *certiorari* to review assessments under the tax law, testimony may be taken when it appears necessary, and thus the return is not conclusive. *People ex rel. v. Carter*, 52 Hun, 458, 5 Supp. 507, affirmed, 117 N. Y. 625. The return to a writ of *certiorari* may be amended as to parties as well as to allegations of the petition. *People ex rel. Benedict v. Roe*, 25 App. Div. 107, 49 Supp. 227, 83 St. Rep. 227.

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Form of Return.

SUPREME COURT.

The People of the State of New York *ex rel.*
Louis Bevier Supervisor of the town of
Marbletown,

agst.

The Board of Supervisors of Ulster County.

To the Supreme Court of the State of New York:

The return of the board of supervisors of the county of Ulster, in obedience to the writ of *certiorari* hereto annexed: The board of supervisors certifies and returns, that on the 28th day of November, 1885, the supervisor of the town of Marbletown appealed from the equalization made by the board of supervisors of the county of Ulster at their annual session in said year. That thereupon a committee was appointed by said board to take charge of said appeal, and such committee proceeded to retain counsel and made preparations to defend said appeal. That they caused searches to be made in the the Ulster County clerk's office for all sales made within five years last past, and proceeded to identify the several properties and prepare sales lists at an expense of about \$1,000, and denies that such expense exceeded \$2,000. That three appraisers were selected to value the property in each town and make a full and complete list thereof, as also in the town of Marbletown and in the city of Kingston. That on the trial one thousand four hundred and forty-seven pages of evidence were taken, covering the testimony of two hundred and seventy-five witnesses, and statements offered in evidence covering every piece of real estate in the county of Ulster. That the brief, on submitting the case, contained seventy-two printed pages, including nine tables. That the said appeal was dismissed. That the board of supervisors proceeded according to the statute to audit and allow said expenses, and audited them at the sum of \$21,447. That said audit was honestly and fairly made, and hereto are annexed abstracts of the proceedings of said board on said audit and of the bill so audited. We do further certify and return that in the preparation of the matter of the appeals before the State assessors, the trial and the final submission in the proper performance of its duty under the statute, the board of supervisors of Ulster County properly and necessarily incurred the costs and expenses allowed to the parties as aforesaid.

All of which we hereby certify and return as commanded by said writ and directed by statute.

In witness whereof, the undersigned chairman and clerk of the
[L. s.] board of supervisors of Ulster County have hereunto set their
hands and the seal of the said county this 2d day of February,
1886.

JOHN E. KRAFT, *Clerk.*
(Add verification.)

C. N. DEWITT,
Chairman.

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Return to Writ.

NEW YORK SUPREME COURT—KINGS COUNTY.

People *ex rel.* Philip E. Miller,*agst.*

Frederick W. Wurster as Commissioner, etc.

149 N. Y. 549.

The return of Frederick W. Wurster, Commissioner of the Fire Department of the city of Brooklyn, to the writ of *certiorari* hereunto annexed :

By virtue of and in obedience to the writ of *certiorari* hereto annexed, and to me directed, I hereby certify and return to the Supreme Court that I have annexed hereto and filed herewith all the proceedings and other matters specified and required by said writ.

In witness whereof I have hereunto set my hand and seal this day of February, 1895.

FREDERICK W WURSTER,

Commissioner.

(Add copies of charges and specifications preferred against petitioner by the foreman or other officers of the fire department showing cause for removal.)

Return to Petition. (126 N. Y. 363.)

To the Supreme Court of the State of New York :

The return of Egbert Hildreth, Erastus F. Post, and William R. Perring, as commissioners of highways of the town of Southampton, in the county of Suffolk, to the writ of *certiorari* hereto annexed :

Obedient to the command of said writ we do hereby certify and return as follows, viz.: On or about March 14th, 1887, the said (insert commissioners' names), as commissioners of highways aforesaid, received an application from John L. Cook and William H. Cook, the relators herein, and others to lay out a highway as described in the affidavit or petition for the writ of *certiorari*, of which the following is a copy: (insert copy of petition for new highway).

On or about the 16th day of March, 1887, there was served on William R. Perring, one of the said commissioners, on James H. Foster, justice of the peace, of said town, and on Henry A. Fordham, the clerk of said town, a notice of which the following is a copy: (insert notice for drawing of a jury).

On the 26th day of March, 1887, at 10 o'clock in the forenoon on that day Henry A. Fordham, as town clerk aforesaid, drew a jury as specified in said notice in the presence of said William R. Perring and of William H. Cook, one of the applicants, and the said town clerk thereupon made his certificate of the drawing of such jury, and the same was on the same day delivered to the said James H. Foster, as justice of the peace.

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That the said James H. Foster thereupon, on the 28th day of March, 1887, as justice of the peace, issued a summons for said jury to meet near the water mills deopot in said town on the 11th day of April, 1887, at 12 o'clock noon, to examine and to certify as to the necessity of said proposed highway, of which summons the following is a copy: (insert copy).

Said summons was delivered to and served by Oliver Fanning, the constable of said town, on the 30th and 31st days of March, 1887, more than six days before the time appointed for the meeting of the said jury. At the appointed time and place the 12 jurors drawn and summoned appeared and were duly sworn to well and truly certify as to the necessity of the proposed highway.

After first viewing the route of the proposed highway and hearing statements for and against said application, the jurors present made and signed and delivered to said commissioners of highways a certificate, of which the following is a copy: (insert copy as to necessity of highway by jurors).

That on April 30th, 1887, the said certificate of said jurors was filed by said commissioners of highways in the office of the town clerk of the town of Southampton. That more than 3 days before April 21st, 1887, a notice of which the following is a copy, was personally served upon the occupants of the land through which the proposed highway was to run, viz.: (insert copy).

(Here insert copy of notice of meeting of the commissioners to decide upon the application made for the road.)

That in accordance with the said notice the said commissioners of highways met and laid out said proposed highway, and made and signed an order of which the following is a copy and said order was recorded and filed in the office of the clerk of the town of Southampton and duly posted by said town clerk on the 30th day of April, 1887: (insert notice of decision).
(Signed and verified.)

Where a board of supervisors refuses to make a return to *certiorari* until the fees are paid, under § 2135, it should state the amount of the fees demanded. *People ex rel. v. Board of Supervisors of Fulton County*, 65 Hun, 622, 20 Supp. 280. In connection with § 2135 of the Code, § 2005 should be considered, and it has been held under this latter section, that the return will not be required unless where fees are paid, where it is necessary to return copies of papers on file in the town clerk's office. *People ex rel. v. Ouderkerk*, 76 Hun, 119, 27 Supp. 821.

The return to the writ of *certiorari* is conclusive as to the facts and cannot be contradicted. If it is defective the court may direct a further return; if it is false the relator's remedy is by action. *People ex rel. Cronk v. Weld*, 6 St. Rep. 175. If the relator deems the return defective, as where it fails to embody

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all the proceedings, he should compel a further return by a proper application to the court under § 2135. It seems that his failure so to do is strictly indicative of the substantial completeness of the return actually made. *People ex rel. Quinn v. Robb*, 31 St. Rep. 642, 9 Supp. 832.

If a return to the writ of *certiorari* is false in fact, the remedy is by an action for a false return, and not by motion for a further return. *People ex rel. Updyke v. Gilon*, 18 Civ. Pro. 111, 9 Supp. 244. If the writ is defective, the court may direct further return, and in the absence of any motion to correct or supply defects, the presumption that the return states the whole truth in respect to the matters specified in and required by the writ is conclusive. *People ex rel. Gage v. Lohnas*, 28 St. Rep. 248, 54 Hun, 608, 8 Supp. 106. Where the writ requires a full account of the proceedings to be reviewed, the court has no authority to strike out any part of the return because it may be irrelevant. Where omissions exist in the return, the court has power to order the making of a further return. This power to order a further return existed at common law. *People ex rel. Higgins v. Grant*, 58 Hun, 160, 33 St. Rep. 810, 19 Civ. Pro. 318, 11 Supp. 505.

Section 3280 of the Code Civil Procedure, which provides that public officers upon whom a duty is imposed by law must execute the same without fee or reward, does not apply to compel a board of supervisors to make a return to the writ of *certiorari* without the payment of the fees provided in § 2135 of the Code. *People ex rel. Sutliff v. Supervisors*, 64 Hun, 376, 46 St. Rep. 471, 19 Supp. 773. In proceedings by *certiorari* against the board of supervisors, § 3280 of the Code Civil Procedure does not apply, but the fee for making such return is to be at the rate prescribed by § 2135, Code Civil Procedure. *People ex rel. Sutliff v. Supervisors*, 47 St. Rep. 928, 20 Supp. 280. If the writ to *certiorari* contains irrelevant and improper statements, the court will disregard them in making its decision, but no part of such return can be stricken out. If all the information which can be furnished to the court is already returned, no further return will be ordered. *People ex rel. Lovell v. Melville*, 58 St. Rep. 557, 7 Misc. 217.

It seems that if a return to a writ is evasive or not sufficiently full, the relator should compel a further return under § 2135

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of the Code; but if instead of asking for a further return, the relator is content to stand upon the return as made, the court is bound to take the same as absolutely true. If the return is false, the relator's remedy is by action for a false return. *People ex rel. P. P. Co. v. Martin*, 142 N. Y. 235, 58 St. Rep. 763, affirming 55 St. Rep. 442. The return is conclusive as to the facts stated, and the court cannot look beyond it to the petition for facts, unless the return admit such facts in the petition. If the return is false or evasive, the relator had his remedy under this section by compelling a further return. *People ex rel. Miller v. Wurster*, 149 N. Y. 554; *People ex rel. McMillen v. Vanderpoel*, 35 App. Div. 73.

It should be noted that *certiorari* to review assessments under Laws 1880, ch. 269, differs from the common-law writ, and that the return therein is not conclusive. The petition is regarded as the complaint, the return as the answer, and in deciding the issues joined thereby the court may call witnesses to its aid, and their testimony becomes part of the proceedings upon which the determination is to be made. *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 431.

A further return will be directed unless the board, whose determination is under review, certifies that all its acts are contained in the return; so held on the review of determination of police commissioners removing an officer. *People ex rel. v. MacLean*, 61 Super. Ct. 458, 19 Supp. 548. It is a sufficient return by a comptroller of the evidence on which he acted in cancelling a tax sale, where he returned the year, volume, and page of the State report on which he relied, without setting out the same *in hac verba*. *People ex rel. v. Wemple*, 67 Hun, 495, 22 Supp. 497, reversed on other grounds, 139 N. Y. 249. A return by commissioners appointed to determine the necessity of the highway, which omits no part of the record, and includes all the evidence on which the committee acted, and states that it reached its conclusion from the evidence and from personal inspection, is not defective. *People ex rel. v. Melville*, 7 Misc. 214, 27 Supp. 1101. A return to *certiorari* signed by the chairman and clerk of the board of supervisors is good, if it was authorized by the majority of the board, although not signed by such majority. *People ex rel. v. Webb*, 66 Hun, 632, 21 Supp. 298. A return to *certiorari* reviewing the decision of the examining board of plumbers in

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refusing an application for a license is insufficient, though setting out the questions and answers on the hearing, if it does not allege that any of the questions were incorrectly answered, or show that such answers were incorrect or defective. *People ex rel. v. Scott*, 86 Hun, 174, 33 Supp. 229. Where, in reviewing the action of an examining board of plumbers, in refusing a license, the petition states that a member of the board told the petitioner that he would oppose the granting of the license because the relator would compete with him in business, a return which does not specifically deny such allegation is defective. *People ex rel. v. Scott*, 86 Hun, 174, 33 Supp. 229. As § 2135 of the Code Civ. Proc. provides that the court may direct a further return, if the first return is defective, the first return will not be considered defective in the absence of a motion to correct the same. *People ex rel. Gage v. Lohnas*, 54 Hun, 604, 8 Supp. 104.

On *certiorari* to review assessments, where the return denies that the assessments were excessive, or that there was any failure to properly value and assess other property, such return is conclusive, if not overcome by proof. *People ex rel. v. Commissioners of Taxes*, 51 Hun, 641, 4 Supp. 41.

The return of a board of supervisors on *certiorari* to review their decision rejecting a sheriff's account must be taken to be true. *People ex rel. v. Board of Supervisors of Clinton*, 64 Hun, 636, 19 Supp. 642. See same case as to allegations in the return amounting to denial under the circumstances.

There is no provision of law or any practice permitting matter to be stricken from a return to *certiorari*. *People ex rel. Higgins v. Grant*, 58 Hun, 158, 11 Supp. 505, 19 Civ. Proc. 318, 33 St. Rep. 810; and where a return contains matter not material, it need not be sent back for correction because the court on the hearing may consider such immaterial matter as surplusage. *People ex rel. v. Webb*, 66 Hun, 632, 21 Supp. 298; *People ex rel. v. Mcville*, 7 Misc. 214, 27 Supp. 1101.

An order refusing to send back a return should be affirmed when it appears from the papers that there is no merit in the application. *People ex rel. v. Webb*, 66 Hun, 632, 21 Supp. 298. Where the return is not apparently defective, the remedy is by action for a false return, and not by motion to correct the same. *People ex rel. v. Gilon*, 9 Supp. 243, 18 Civ. Proc. 109. In such

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action for an alleged false return to a writ of *certiorari* reviewing the proceedings of highway commissioners, a judgment for the plaintiff will be reversed where it appears that the portion alleged to be false was intended as a statement by the defendant of his holding as a commissioner, and not as an assertion of fact. *Beardslee v. Dolge*, 65 Hun, 623, 20 Supp. 161.

While the return to the writ of *certiorari* may be required to be made by an officer whose term has expired, yet, where such return contradicts the official return made by the board itself, it seems that the return of the board will be given the controlling weight on the grounds that the record cannot be contradicted. See full discussion on the weight to be given to contradictory returns in *People ex rel. Masterson v. Marin*, 17 App. Div. 562. While the writ may issue to an officer whose term has expired, yet, where the office is a continuing office, such as the comptroller of the State, and the record to be reviewed is in the possession of the successor to such office, the present incumbent of the office is the proper party, notwithstanding the transaction to be reviewed was the act of the previous incumbent. Such previous incumbent need not be made a party. § 2136, Code Civ Proc. notwithstanding. *In the Matter of Tiffauy & Co.*, 62 St. Rep. 395, 30 Supp. 495.

It seems that whatever power the court has to consider additional affidavits on the hearing of *certiorari* by virtue of § 2139 of the Code, yet, after argument and after several months have elapsed since the filing of the return, the court will not permit the introduction of affidavits. *People ex rel. S. C. O. Co. v. Wemple*, 61 Hun, 85, 15 Supp. 447.

Note the distinction between the general statutory writ of *certiorari* regulated by the Code and the *certiorari* to review assessment which is created by special statute, and in which a re-determination of all questions of fact upon evidence taken by the Special Term or under its direction may be had. See *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 430.

It seems that additional affidavits will not be considered upon the hearing except for the purposes set forth in § 2139, that is to say, for the purpose of showing facts essential to the jurisdiction of the body or officer to make the determination to be reviewed; or that the officer whose duty to make a return has died, absconded, or removed from the State, etc. *People ex rel.*

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Simons v. Murray, 14 Misc. 177, 69 St. Rep. 815. Compare also *People ex rel. Kidd v. Commissioners of Excise*, 25 Supp. 874; *People ex rel. Sprague v. Board of Excise*, 91 Hun, 99; *People ex rel. McMillen v. Vanderpoel*, 35 App. Div. 73. Section 2136 is in accord with *People v. Fire Commissioners*, 73 N. Y. 437, holding that, if a return is insufficient, a further return may be compelled. *People v. Dains*, 38 Hun, 43. This is done by motion. This was held in *Overseers of Poor of Brooklyn v. Overseers of Southold*, 2 Cow. 575. If a corporation refuses to make return, a writ of sequestration may issue after *distringas*. *People v. City of Brooklyn*, 5 How. 314. Upon return to a writ of *certiorari*, if the return is false in fact or insufficient in form, the remedy is, in the former case, by action for false return, and in the latter by compelling a further or more specific return. *People v. Campbell*, 50 N. Y. Super. 82. The hearing to review the refusal of an excise board to grant a license must be heard upon the writ and the return; and the individual affidavits of the members of such board will not be considered except in the case of their absence, insanity, or death. *People ex rel. Sprague v. Board of Excise*, 91 Hun, 94, 71 St. Rep. 697, 36 Supp. 678; nor should affidavits which are merely cumulative be considered upon the hearing. *People ex rel. Shields v. Hayden*, 7 Misc. 292, 58 St. Rep. 544, 27 Supp. 893.

ARTICLE VIII.

HEARING AND QUESTIONS TO BE DETERMINED.

§§ 2138, 2140.

§ 2138. [Am'd, 1895.] Hearing upon return.

The cause must be heard at a term of the appellate division of the Supreme Court, held within the judicial department embracing the county where the writ was returnable. Either party may notice it for hearing at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.

§ 2140. Questions to be determined.

The questions involving the merits to be determined by the court upon the hearing are the following only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
2. Whether the authority conferred upon the body or officer in relation to that subject-matter has been pursued in the mode required by law, in order to authorize it or him to make the determination.

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3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

4. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence.

Section 2138 requires the case to be heard not only upon the return, but also upon the papers upon which the writ was granted. It is not, however, the design of this extension of the law to allow the return to be controverted or overthrown in its statement by anything contained in the papers presented for the allowance of the writ. At common law the return was conclusive as to the facts contained in it, and it seems that it was not the purpose of the legislature by the provisions of § 2138 to interfere with the existence of the previous rule. The intention was, it seems, that where the return itself might be silent, that the affidavits or papers upon which the writ was granted might be resorted to for the purpose of including facts not sent out in the return. *People ex rel. McCarthy v. French*, 25 Hun, 112. See this case for a discussion to the scope of § 2138, Code Civil Procedure, as to what papers shall be used upon a hearing.

Affidavits upon the part of the relator not used on the application of the writ and first presented when the matter is heard thereto are no part of the return, and are not admissible in the case. *People ex rel. Sprague v. Board of Excise*, 91 Hun, 98. Though § 2138 of the Code Civ. Proc. provides that the hearing upon the return to *certiorari* "must be heard upon the writ and return, and the papers upon which the writ was granted," yet this does not mean anything more than what the General Term must have before it at the time of the hearing and upon which it must base its decision. Where the return to a writ of *certiorari* practically admits all the allegations of the petition, such allegations may be considered by the court. *Pco. ex rel. White v. Clinton*, 28 App. Div. 478, 51 Supp. 115, 85 St. Rep. 115. An objection not taken before the assessors, that relator was assessed in the wrong ward, should be disregarded by the Special Term on the hearing of a *certiorari*. *Pco. ex rel. Citizens' Electric Illuminating Co. v. Neff*, 26 App. Div. 542, 50 Supp. 680, 84 St. Rep. 680. In order for a board of police commissioners to discharge

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a member of the police force it must find him guilty of the charge, and a mere resolution dismissing him without finding him guilty is without effect, and he should be restored to his position. So *held*, where a police force after hearing proofs as to charges against a policeman entertained a motion to dismiss the charges, but never decided that motion, and thereafter without finding the accused guilty of the offence passed a resolution dismissing him from the police force. *People ex rel. Reidy v. Grady*, 26 App. Div. 593. The State board of railroad commissioners may grant an application by a railroad company for leave to abandon one of three stations in a city of twenty-five thousand inhabitants, notwithstanding the fact that the station has been paid for by the citizens and was conveyed to the railroad company under an agreement that in consideration thereof the railroad would cause its trains to stop at said station for passengers, and where the agreement contained nothing to indicate how long it should continue in force. It seems that the board of railroad commissioners is not authorized to pass upon the force and effect of contracts made between a railroad company and third parties. *People ex rel. Loughran v. Commissioners*, 32 App. Div. 160, 52 Supp. 901.

Where a clerk in the department of buildings of the city of New York was removed without service upon him of a notice of the cause of his proposed removal, and without a hearing being given him, as required by the Consolidation Act, Laws 1882, chapter 410, § 48, such a removal is without according the relator his legal rights, and he should be reinstated. *People ex rel. McCabe v. Constable*, 27 App. Div. 76. Also *held*, in this case, that upon the facts the charge upon which he was removed was frivolous and baseless. *Id.* It is part of our State system to commit many governmental powers, involving judicial, executive, and ministerial functions, to a single officer or a board or commission, and if such body, in the exercise of its functions, renders its decision upon a misapprehension of the law, such error should be corrected. So *held*, in relation to the decision of the board of railroad commissioners in reference to an application by a street surface railroad for permission to change its motive power. *People ex rel. Babylon R. R. Co. v. Commissioners*, 32 App. Div. 182. Section 2138 does not mean that the court is at liberty to look beyond the return and to consider the facts contained in the accompanying papers, unless the return to the

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writ made by the respondent should be an admission made to those facts or an equivalent to an admission. *People ex rel. Miller v. Wurster*, 149 N. Y. 554, 25 Civ. Pro. 370, reversing 91 Hun, 234, distinguishing *People ex rel. Peck v. Commissioners*, 106 N. Y. 64. Though § 2138 of the Code Civil Procedure provides that the hearing shall be had upon the writ, the return, and the papers upon which the writ was granted, yet, where the petition for the writ contains a great mass of facts which are not pertinent to the review, it seems that all the court will consider are the facts which show that a proper case existed for issuing the writ. *People ex rel. Kidd v. Commissioners*, 25 Supp. 874.

The statute requires that the hearing upon the return to the writ of *certiorari* must be at a term of the appellate division held within the judicial department embracing the county where the writ was returnable; not so, however, as to the writ to review assessments, which should be heard at Special Term. See *People ex rel. Ulster, etc., R. R. Co. v. Smith*, 24 Hun, 66.

Section 2138 provides that except as prescribed in the following section, which provides that the court may in its discretion allow the modification of affidavits or other written proofs, the return must be heard upon the writ and return and papers upon which the writ was granted. See *People ex rel. Hopkins v. Com. of Excise*, 4 Misc. 330. Except as otherwise provided, the hearing must be upon the writ, return, and the papers upon which the writ was granted, and it seems that the papers will be presumed to contain all the proceedings, inasmuch as if the relator considers the return defective he should have compelled a further return by the proper application under § 2135 of the Code of Civil Procedure. *People ex rel. Quinn v. Robb*, 31 St. Rep. 641, 9 Supp. 832.

While § 2139 permits the court in its discretion to allow the introduction of affidavits, yet where several months have elapsed since the return the General Term will not permit the introduction of affidavits contradicting the statements of the return after the argument upon the hearing. In such case it seems the hearing should be restricted to the papers specified in § 2138. *People ex rel. S. C. O. Co. v. Wemple*, 39 St. Rep. 739, 15 Supp. 447. The practice prior to the present Code required that the hearing upon the return to *certiorari* should be solely upon the return (*Peo. ex rel. Simms v. Fire Com.*, 73 N. Y. 437), but § 2138 of the

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present Code requires that the hearing be had upon the writ and return and the papers upon which the writ was granted. Under this section where the return meets all the allegations of the writ and the papers upon which it was granted, and traverses them, then the hearing must be confined to the facts stated in the return, but where the return admits the facts of the writ or the papers upon which it was granted, or is silent as to them, then such facts become important, and must be considered upon the hearing. *Peo. ex rel. Peck v. Com. of Brooklyn*, 106 N. Y. 67, 8 St. Rep. 635. Where the return traverses the facts alleged in the writ and the papers upon which it was granted, the hearing will be confined to the facts stated in the return, though such statements as only amount to an opinion will not be considered, and the facts and circumstances relating thereto and appearing in the writ and return and papers must then be considered and the issue decided upon them. *Peo. ex rel. Kinsella v. Wurster*, 89 Hun, 6, 69 St. Rep. 446. At common law only the return to the writ was before the court upon review, though § 2138, Code Civil Procedure, has changed the former practice, and now, therefore, the writ and the papers upon which it was granted must also be looked to. It seems, however, that additional affidavits will only be considered when strictly in compliance with § 2139, Code Civil Procedure. *Peo. ex rel. Simons v. Murray*, 14 Misc. 177, 69 St. Rep. 815. The court is required to determine the case upon the petition writ and return. *Peo. ex rel. Hovey v. Leavenworth*, 90 Hun, 53, 69 St. Rep. 857. If there is evidence in the record brought to the Supreme Court by the *certiorari*, the court must look into the facts. It is the purpose of the law to give a review in the Supreme Court by *certiorari*, not only upon the law but upon the evidence to the extent specified in the statute. Code Civil Procedure, § 2140. Every party who seeks such a review is entitled to the fair and judicious exercise of that jurisdiction. *Peo. ex rel. McAleer v. French*, 119 N. Y. 507. While at common law and under the Code the return seems to be conclusive upon both parties as well as the court, yet where it is sought to review assessments by *certiorari* under the statutory provision of chapter 269, Laws 1880, the court may take evidence, and such testimony shall constitute a part of the proceedings upon which the determination shall be made, such being the provision of the statute. *Peo. ex rel. Dexter v. Palmer*,

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86 Hun, 515, 67 St. Rep. 701, 33 Supp. 926. Statements of counsel on argument after the evidence has been given as to facts, cannot take the place of proof, and are no part of the return, whether they are replied to or not by the opposing counsel. *Burnham v. Jones*, 49 Supp. 365, 2 Supp. 148, judgment modified, 112 N. Y. 597. In *People v. Nichols*, 58 How. 200, it was held that the rule requiring eight days' notice is binding only so far as it is consistent with the Code, and that as the Code provided that a notice for hearing a motion for judgment might be made less than eight days, the Code must control, and that an application for judgment so made was regular. Where the relator fails to deny or traverse the sufficiency of a return to a writ of *certiorari*, the facts alleged therein will be taken as conclusive. *People ex rel. v. Koch*, 2 State Rep. 110; *People v. Fire Commissioners*, 73 N. Y. 439.

The codifiers as to § 2140 have said: "The questions which the foregoing section aims to settle have been the subject of a great number of adjudications within this State, many of which are obsolete and contradictory." (See 2 Abb. Dig. (new ed.) tit. *Certiorari*, 11-13, art. 118-139.) As late as 1866 it was forcibly said by Morgan, J.: "The decisions of the courts, in relation to the office of a common-law *certiorari*, are so conflicting that it is quite impossible to say that any settled rule has ever been established in this State which has not been subsequently departed from." *Baldwin v. City of Buffalo*, 35 N. Y. 380. Since then these questions have been again before the Court of Appeals in various cases, in the latest of which, *People v. Smith*, 45 N. Y. 772, decided in 1871, Grover, J., lays down the following rule: "Whatever may have been the conflicting authority heretofore, upon the question whether, upon a common-law *certiorari*, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject-matter, it must not be regarded as settled in this State that it is the duty of the court, in addition thereto, to examine the evidence, and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated." Id. 776, 777. If so much certainty has at last been attained, it seems to be desirable to prevent the possibility of reopening the questions thus decided, and to declare definitely that the cases

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holding the other way are obsolete by incorporating these principles into the statute. Subdivisions 1 to 4 of the foregoing section embody them correctly, it is believed, the changes of language being such only as appear to be necessary. Subdivision 5 is not in conflict with the ruling in 45 N. Y., but it settles a question which was not considered therein, in general accordance with the opinion of Potter, J., in *People v. Eddy*, 57 Barb. 593; see p. 601."

In connection with these remarks it must also be noted that subsequent to 45 N. Y. 772, the line of decisions up to 1880 ran in a different direction, and in his note to this section Mr. Bliss, in his Annotated Code, very justly remarks that the section is new, "but the commissioners considered, when prepared by them, that it made no change in the law, regarding subdivision 5 as consistent with 45 N. Y. 772, and 57 Barb. 593, which were then the latest cases, but it is hardly consistent with 69 N. Y. 408, and some other cases since published." As was remarked with reference to § 2134 as to the contents of the return, the decisions before the Code were not only in direct conflict with the rule established by this section, but are not reconcilable among themselves, as may be said of the cases in 45 N. Y. and 68 id., just cited. The old rule was strongly that the question of jurisdiction only could be determined on *certiorari*. It would seem the courts then adopted a much more liberal view, and allowed the evidence to be looked into somewhat, and questions of law to be considered; then the pendulum swung back and only questions of law, materially affecting the rights of the litigants, could be determined. The first stage arrived at by the courts is the strict adherence to the rule that on a common-law *certiorari* no other questions can be reviewed than those relating to the jurisdiction below, and to the regularity of the proceedings, and this view is held in the earlier cases. *Birdsall v. Phillips*, 17 Wend. 464; *Allyn v. Commissioners*, 19 id. 342; *Miller v. Bush*, 21 id. 651; *People v. New York City*, 2 Hill, 9; *People v. Judge of Columbia*, id. 398; *Haviland v. White*, 7 How. 154. To the same effect is the rule that where the jurisdiction of an inferior court depends on extrinsic facts, the court will examine the evidence to determine the question of jurisdiction, but for no other purpose. *Held*, in *People v. Board of Metropolitan Police*, 24 How. 481, and substantially in *People v. Sanders*, 3 Hun, 16, also in *People v.*

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Overscers of Ontario, 15 Barb. 286, that on the return to a common-law *certiorari* the Supreme Court will not consider the weight of evidence, but they will determine whether there was any legal evidence to support the proceedings below. But it was nevertheless held during this period that on a *certiorari* to review summary proceedings against a tenant holding over, the court had power to look into the evidence to see whether it authorized the findings. *Anderson v. Prindle*, 23 Wend. 616; *Niblo v. Post*, 25 id. 280; *Benjamin v. Benjamin*, 5 N. Y. 383; *Morewood v. Hollister*, 6 id. 309; *Brick v. Binninger*, 3 Barb. 391; *People v. Rochester*, 21 id. 656; *Carter v. Newbold*, 7 How. 166. It was also held that the court would look only into the facts returned, on the question of jurisdiction, and could not assume there was other evidence to sustain jurisdiction. *People v. Soper*, 7 N. Y. 428. But that a common-law *certiorari* in a bastardy case did not bring up the evidence. *People v. Duell*, 16 How. 43.

It was subsequently held that where the decision of a public board is made final and conclusive by statute, the court cannot look into the evidence to sustain it in the absence of a jurisdictional fact. *People v. Canal Board*, 7 Lans. 220. But see rule laid down in *Peo. ex rel. McAleer v. French*, 119 N. Y. 507, *post*. It was also held that on a *certiorari* to review the decision of the canal commissioners, only legal and constitutional questions can be considered. *People v. Carrington*, 2 Lans. 368. As to *certiorari* to review an assessment under the general Tax Law, it was held (*People v. Fredericks*, 48 Barb. 173) that the only questions before the court were whether the assessors had jurisdiction, and whether they had kept within it. It was also said that, on *certiorari* to review assessment of damages, the court could not reverse the assessment as to the amount of damages, but might as to the principle on which they were assessed. *Baldwin v. Calkins*, 10 Wend. 167. But see *Matter of Mount Morris Square*, 2 Hill, 14. In *People v. Ferris*, 36 N. Y. 218, it was held that, on *certiorari* to commissioners of highways, the Supreme Court could only affirm or reverse the proceeding.

Short'y after, it was said, in *People v. Assessors of Brooklyn*, 39 N. Y. 81, that a common-law *certiorari* brought up for review all questions of jurisdiction, power or authority in the inferior tribunal, and all questions of the regularity of the proceedings which seems to mark what appears to be the transition state of the law on this

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subject. And in *People v. Smith*, 45 N. Y. 772, and *People v. Eddy*, 57 Barb. 593, it was determined that, in a town-bonding case, on the return to a common-law writ of *certiorari*, the court was not limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication to be made, and whether, in making it, any rule of law affecting the rights of the petitioner had been violated, and that the court might examine as to whether the inferior tribunal had jurisdiction. Whether the moving party had, on all the facts proved, made out a case, whether the testimony supported the matter charged, but with the qualification that where some evidence is given to support the case, however slight, if judgment be given thereon, where there is evidence upon the merits on both sides, the court will not reverse unless the case is one in which the weight of evidence is very greatly preponderating, or is so strikingly so, as to create the suspicion of injustice arising from prejudice or passion. The same rule is held in *People v. Van Alstyne*, 32 Barb. 131; *People v. Supervisors*, 57 id. 377. And it is held in *People v. Assessors of Albany*, 40 N. Y. 154, that a common-law *certiorari*, to assessors, brings up the merits as well as the questions of jurisdiction and regularity, and the same general principle is held in *People v. Board of Police*, 39 N. Y. 506; *People v. Commissioners*, 54 Barb. 145. It was determined in *People v. Lawrence*, id. 589, and *People v. Tubbs*, 59 id. 401, that where the writ was given by statute, the authority of the court was not limited, as at common law, to questions of jurisdiction and regularity, but it might look into the merits and examine the evidence, and affirm, reverse, or quash the proceedings, as justice may require. It was in view of these decisions, and to conform the practice to the rule as there settled that the codifiers prepared this section, and these cases probably best interpret its scope and meaning.

However, subsequent to the rendering of these decisions, and in matters arising before the enactment of the Code, a somewhat different rule was held. The case cited by Bliss (*People v. Board of Police*, 69 N. Y. 408) is, perhaps, a typical case of this class, showing the backward swing of the judicial pendulum in holding that only errors of law affecting materially the rights of the parties may be corrected on common-law *certiorari*. The evi-

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dence may be examined to determine whether there is any competent proof to justify the adjudications made, but questions of fact on conflicting evidence, or conflicting inferences from facts or matters of judgment or discretion, cannot be reviewed. It was held, in *People v. Hair*, 29 Hun, 125, that errors in the admission or rejection of evidence cannot be reviewed by *certiorari*. The same rule has been recently held in *People ex rel. v. Board of State Assessors*, 22 Week. Dig. 453, as to review of proceedings of board of equalization. *People v. Keator*, 17 Abb. N. C. 369.

To the same general effect is *People v. Steele*, 56 N. Y. 664, holding that it is the office of a common-law *certiorari* to review the determination upon the same evidence, and to examine whether the inferior tribunal has conformed in its proceedings to the express terms of the statute law, and recognized in its determination the principles of the common law; and if there were legal and sufficient evidence to authorize the finding, the decision upon the question of fact will not be disturbed. And in *People v. Police Commissioners*, 6 Hun, 229; *People v. Police Commissioners*, 52 How. 289; *People v. Weigant*, 14 Hun, 546, it is held that, on a common-law *certiorari*, it is the duty of the court to see whether there was any competent proof to sustain the adjudication, and whether, in making it, any rule of law has been violated, but mere matters of detail or of discretion will not be reviewed. It is also determined in *People v. Board of Police*, 72 N. Y. 415, that the court is not confined to the mere question of jurisdiction, but will look into the proceedings, and if the adjudication is unsupported by any evidence, will reverse it. Upon a *certiorari* to review proceedings in insolvency, the appellate court may determine not only the question of jurisdiction, but the regularity of the proceedings below. *People v. Sutherland*, 16 Hun, 192. Since the Code of Civil Procedure, the decisions have been in accordance with the terms of this section, and in conformity with the views expressed in 45 N. Y. 772, *supra*. In *People v. Fire Commissioners*, 30 Hun, 376, it was decided that, under this section, the court might, on *certiorari*, review the weight of evidence; and distinguished *People v. French*, 92 N. Y. 306, which held that this section only applied to cases on the hearing, and not on appeal to the Court of Appeals. The Court of Appeals held the same rule as applicable to appeals to that court in *People v. Commissioners*, 93 N. Y. 97, as follows: "Assuming the rule

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to be that the facts involved in the determination are satisfactorily supported by the evidence, so that the verdict of a jury finding such facts could not be set aside as against the weight of evidence, we are unable to see how it can be claimed that the decision of the commissioners was not justified."

The scope of a review upon a *certiorari* has been enlarged, and a judgment may be reversed if there is such a preponderance of proof against the existence of the facts found against the relator as would, had the facts been found by a jury, call for a reversal of the verdict as against the weight of evidence. *People v. Jordan*, 1 Civ. Pro. 328. The Court of Appeals held the rule as to review in that court as in previous cases cited in *People v. Fire Commissioners*, 96 N. Y. 644, citing *People v. Fire Commissioners*, 82 id. 358. The court should not reverse for error in finding of fact by court below unless it was clearly against preponderance of proof, so held under chapter 269, Laws of 1880, and on review of action of State assessors. *People v. Keator*, 17 Abb. N. C. 369; *People v. Williams*, id. 366. A conclusion of fact, if without competent proof to support it or opposed by a decided or strong preponderance of evidence, may be reviewed by the court. A decision adverse to the evidence and the conceded truth was an error subject to judicial review and correction. *People v. Zoll*, 97 N. Y. 203; *People v. Heldon*, 32 Hun, 299, holds that, on *certiorari* to review the decisions of referees appointed to hear an appeal from determination of highway commissioners, a presumption arises that all the preliminary requirements of the statute have been complied with, and that the only proceedings to be reviewed were those connected with the inquiry as to the fitness or unfitness of the road. In case of removal of auditor of accounts by comptroller of New York City it was held that it was not for the court to weigh the evidence so as to substitute its judgment for that of the comptroller. *People v. Grant*, Abb. Dig. 1884, p. 51, § 10. The question of extent of review of proceedings of inferior tribunals by *certiorari* is fully considered in *People v. McCarthy*, 102 N. Y. 630, and is held in accordance with rules laid down in the Court of Appeals under the present Code. The language of the section must, therefore, be interpreted in the light of the decisions since its enactment. Previous decisions will be found convenient for reference in all cases where no change has been made from former practice.

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Unless jurisdiction is expressly taken away *certiorari* lies even when the decision is declared final, by the older cases. *Leroy v. Mayor*, 20 Johns. 430; *Bradhurst v. Turnpike*, 16 id. 8; *Ex parte Mayor of Albany*, 23 Wend. 277. But *People v. Betts*, 55 N. Y. 600, held the rule to be that where the statute declares the decision final, *certiorari* will not lie, but it seems to be subject to the qualification laid down in *People v. Freeman*, 3 Lans. 148; *People v. Canal Board*, 7 id. 220; *People v. Dewey*, 1 Hun, 529, that the court may still inquire into the jurisdiction of the inferior tribunal to pass upon the subject-matter, and whether within the jurisdiction the acts performed were within the powers conferred by law.

The objection that a *certiorari* was improperly awarded may be considered on a return and hearing on the merits. Moving for an amended return is not a waiver of motion to quash. *People v. McDonald*, 2 Hun, 70. On *certiorari* in *habeas* proceedings the objection that there was no traverse to the return cannot be taken if evidence was taken and considered without objection. *People v. Carpenter*, 46 Barb. 619. If evidence was admitted without objection its competency cannot be passed upon by *certiorari*. *People v. Sanders*, 3 Hun, 16. Where it appears by the return to the writ that the inferior tribunal was entirely without jurisdiction it is wholly immaterial whether the relator raised the objection below or not. *People v. Robertson*, 26 How. 90. It was said in *Commissioners v. Judges of Putnam*, 7 Wend. 264, that where the contest was solely on the merits objection could not afterward be taken, that one of the judges whose decision was appealed from had previously passed on the same question.

A jurisdictional question may be reviewed upon the evidence on the return to the *certiorari*. *Stone v. Mayor*, 25 Wend. 157. On *certiorari* to a municipal corporation to review proceedings on a local improvement the court will review the assessment only as to the principle of apportionment and not as to the amount charged on an individual. *Bouton v. President*, 2 Wend. 395; *Owners of Ground v. Mayor*, 15 id. 374; *Ex parte Mayor of Albany*, 23 id. 277. In reviewing assessments for a sewer the court cannot interfere as to the *quantum* of benefit to be derived by each lot, but may decide as to the persons to be affected on a proper construction of the law. *Leroy v. Mayor*, 20 Johns. 430.

The court will not, on *certiorari*, vacate proceedings for a

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local improvement for an irregularity which does not go to the entire assessment, where there is a sufficient remedy otherwise for irregularity. *People v. City of Brooklyn*, 14 Abb. (N. S.) 115. Mere irregularities in submitting to the electors questions as to an improvement as authorized by statute, which are executive or ministerial acts, cannot be corrected by *certiorari*. *People v. Trustees of Danville*, 1 Hun, 593. On *certiorari* to a city to review proceedings on assessment of expenses for a bridge, the court will not, as ground for setting aside the assessment, consider the validity of a contract for building the bridge. *People v. Common Council*, 5 Lans. 142.

Certiorari lies to a board of supervisors to review the rejection of a claim declared by the legislature to be a lawful charge against the county, when rejected on the ground that it is not just and legal. The court can reverse the proceeding, and the relator can then mandamus, if necessary. *People v. Supervisors of Madison*, 51 N. Y. 442. On *certiorari* to review town-bonding proceedings, the question of eligibility of the commissioners named to issue bonds could not be raised, where the return of the county judge showed them to be proper persons. *People v. Hulbert*, 59 Barb. 446. It is held in *People v. Sheriff*, 29 id. 622, that the Supreme Court cannot review, on *certiorari*, the judgment of a court committing for contempt. The court cannot take notice, on *certiorari*, of any fact outside the record, and where matters do not appear by the record they cannot be reviewed. *People v. Wheeler*, 21 N. Y. 82. In cases where the writ is authorized by statute, the authority of the court is not limited to questions of jurisdiction and regularity. It has power, also, to examine upon the merits every decision of the court or officer upon questions of law, and to look into the evidence and to affirm, reverse, or quash the proceedings as justice may require. *People v. Lawrence*, 54 Barb. 589. The decision of board of education of New York City in removing a teacher cannot be reviewed, as the power of the board is discretionary. *People v. Board of Education*, 3 Hun, 177. The proceedings of the board of police are to be reviewed with liberality rather than severe criticism, with a view to sustain, rather than reverse, their decisions. *People v. Board of Commissioners*, 8 Week. Dig. 466. It is said in *People v. Board of Fire Commissioners*, 5 id. 486, that the court can, on *certiorari*, review the whole evidence as to the conviction and removal of a

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regular clerk in the fire department (see cases cited heretofore), while *People v. Board of Police Commissioners*, 11 Hun, 513, affirmed in the Court of Appeals, 52 How. 289, held that the writ brought up only the question whether the board had jurisdiction of the relator and of the subject-matter, whether he was regularly tried, and whether legal and sufficient testimony was given sufficient to justify the board in finding him guilty. See *Pennie v. City of Brooklyn*, 97 N. Y. 654; *People v. Commissioners*, 3 St. Rep. 615. Justices' judgments can no longer be reviewed by *certiorari*. *People v. Sleight*, 2 Hun, 632. The title to office, of persons acting as police justices in New York City with color of title, cannot be tried on *certiorari* to review a judgment rendered by them. *Coyle v. Sherwood*, 1 Hun, 272.

The decision of a comptroller in fixing the amount of capital stock of a foreign corporation for purposes of assessment, will not be disturbed by the court in the absence of evidence that the amount so fixed was erroneous. The finding of the comptroller upon such a question within his jurisdiction is like the verdict of a jury. *People ex rel. S. T. C. Co. v. Wemple*, 42 St. Rep. 60, 16 Supp. 603. The comptroller as a public officer is charged with the duty of imposing taxes, and his acts and determinations cannot be reversed unless it clearly appears that his determination was against the weight of evidence upon questions of fact, or unless it clearly appears that his conclusions of law were erroneous. *People ex rel. E. E. I. Co. v. Wemple*, 61 Hun, 64, 39 St. Rep. 613, 15 Supp. 717. Commissioners of the land office may exercise their discretion in making a grant, but their decision as to who is the owner of adjacent uplands is a judicial one and reviewable upon *certiorari* where such determination involves the question of the relator's title. *People ex rel. Burnham v. Jones*, 112 N. Y. 609. One of the offices of the writ of *certiorari*, under § 2140, Code Civ. Proc., is to inquire into the jurisdiction of the body or officer making the determination which is the subject of review. *People ex rel. Springsted v. Trustees of Cobleskill*, 49 St. Rep. 48, 20 Supp. 920; *People ex rel. Cook v. Hildreth*, 126 N. Y. 360, 37 St. Rep. 393. Where by statute the secretary of State, the comptroller, and the State reporter as a contract board had discretion in making a contract for the publication of the reports of the Court of Appeals, and made such a contract, and where, upon a writ of *certiorari* to review such decision, no determination was shown to

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have been made upon evidence, the writ of *certiorari* will not lie, the board having the right to the exercise of such discretion. Neither can the decision be reviewed under the authority of subdivision 3 of § 2140, as there is no proper relator whose rights have been violated. *People v. Carr*, 23 Supp. 113.

Certiorari is a proper remedy to review the determination of a board of health, and it is the duty of the court to determine by such writ, whether jurisdiction was obtained by the board of health, and whether the authority conferred upon it has been pursued in the mode required by law in order to authorize it to make the determination. *People ex rel. N. Y. C. & H. R. R. Co. v. Board of Health of Seneca Falls*, 58 Hun, 598, 12 Supp. 562, 35 St. Rep. 413. Upon *certiorari* the court will indulge the same presumption in favor of a determination of a board of police commissioners in removing an officer, that it would in support of a verdict of a jury. *People ex rel. Doherty v. Commissioners*, 84 Hun, 66, 65 St. Rep. 175. Whether a default shall be opened and a rehearing had where a teacher has been dismissed by a board of education, and has failed to appear at the time set for a hearing, is purely a matter of discretion of the board of education, and therefore their determination is not subject to revision and reversal by another tribunal. "*Certiorari* to compel the concession of a favor would be an anomaly in jurisprudence." *Jordan v. Board of Education*, 14 Misc. 119, 69 St. Rep. 623, 25 Civ. Proc. 89. Where there is competent proof of the facts necessary to be proved in order to authorize the determination of police commissioners in removing an officer, and there is no preponderance of proof against the existence of any of these facts that would justify the court in setting aside the finding of a jury as against the weight of evidence, the decision of the commissioners will not be disturbed. *People ex rel. Allen v. Welles*, 14 Misc. 226. Where a town board refuses to audit the claim of a contractor at its full amount, but assumes conditionally to audit the claim for a less amount, a rule of law has been violated to the prejudice of the relator under subdivision 3 of § 2140, and in such case the court has power to amend and modify the determination of the town board. *People ex rel. Groton Co. v. Town Board of Campbell*, 92 Hun, 585. In reviewing the action of a board of taxes and assessment of the city of New York in dismissing a tax assessor and discharged soldier because of physical incapacity,

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it is the duty of the court to see if any rule of law affecting the rights of the relator was violated to his prejudice, and whether there was any competent proof of all the facts necessary to be proven to justify the determination. *People ex rel. Haverly v. Barker*, 1 App. Div. 533. See this case as to what was insufficient and inadmissible evidence to warrant dismissal under the circumstances.

While no employee in a bureau of any of the departments of the City Government of the city of New York is entitled to a formal trial upon evidence in the proceeding to dismiss him, as are police officers and firemen, yet, such employee is entitled to a hearing, and his explanation must be received and acted upon in good faith and not arbitrarily; such decision may be reviewed by *certiorari*. *People ex rel. Mitchell v. La Grange*, 2 App. Div. 445. See this case for facts not warranting a dismissal. The decision of police commissioners in removing a policeman will not be disturbed where the evidence does not show such preponderance of proof, as would justify setting aside the verdict of a jury, or where the decision is not sustained by competent proof under § 2140. *People ex rel. O'Sullivan v. French*, 27 St. Rep. 87, 7 Supp. 489. Even where manifest injustice has been done in removing a police officer, the court will not set aside the decision of the police commissioners where the excuse given by the relator for the act causing his removal was a matter solely within the judgment of the police commissioners. Bartlett, J., dissented under the authority of subdivision 1 of § 2140. *People ex rel. Hogan v. French*, 27 St. Rep. 130, 7 Supp. 460, reversed, 119 N. Y. 502.

Even at common law, and previous to the Code, the Supreme Court had power to look into the evidence brought before it in reviewing the determination of police commissioners and discharging an officer; and now by § 2140 of the Code of Civil Procedure upon such hearing, it is the duty of the Supreme Court not only to inquire whether there is any competent proof tending to establish the guilt of the accused person, but it must also look into the evidence, and if it finds that there is a preponderance of evidence against the determination of the commissioners, then it has the same jurisdiction to reverse the determination that it has to set aside the verdict of a jury as against the weight of evidence, and every party who seeks such

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a review is entitled to a fair and judicious exercise of that jurisdiction. *McAlcer v. French*, 119 N. Y. 507, 30 St. Rep. 75. Where the relator, a police officer, was discharged by the commissioners for altercation with a brother officer, in which the proof showed him to be less to blame than the other officer, who was only fined thirty days' pay, it was *held* that the punishment was too harsh and unequal and that the decision should be reversed, under sub. 5, § 2140, Code Civ. Proc. *People ex rel. Clarkson v. French*, 1 Supp. 878. Where the evidence adduced before police commissioners is direct and positive, they are justified in dismissing an officer for intoxication, and the decision will not be set aside under this section. *People ex rel. Foley v. French*, 20 St. Rep. 913, 4 Supp. 172. The decision of assessors upon a claim for damages sustained by reason of a change of the grade of a city street is open to review under subdivision 3, § 2140, Code Civ. Proc., which provides that the court must inquire "whether in making the determination any rule of law affecting the rights of the party thereto has been violated to the prejudice of the relator," even when the facts are conceded in the return. Thus where it was conceded that damages were in fact sustained, but that the assessors arrived at their conclusion by offsetting benefits, *held*, that a question of law was presented and the decision of the assessors thereon was open to review. *People ex rel. Brisbain v. Zoll*, 97 N. Y. 208. It seems that the rule is well established that the courts, in reviewing by *certiorari* the proceedings of police or fire commissioners, are only called upon to reverse: 1. If the accused on the whole case did not have a fair trial; 2. If on the facts the decision was against the weight of evidence. And in passing upon the proceedings before police commissioners, the court will not reverse for trifling errors but will look to the whole case. *People ex rel. Muldoon v. Hayden*, 7 Misc. 278, 58 St. Rep. 537.

The questions to be determined upon the hearing of *certiorari* are now specifically stated in § 2140 of the Code, which does not permit a review of matters committed by law to the judgment or discretion of a lower tribunal, and therefore under Laws 1893, chapter 481, amending the Excise Law and giving a review of the decision of the commissioners in refusing a license where such license has been "arbitrarily or unreasonably refused," the court has no power of independent inquiry and is limited solely

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to a review of the record presented. *People ex rel. Kidd v. Commissioners of Excise*, 25 Supp. 874. While the court upon *certiorari* may review the action of a board of supervisors, it will not reverse their decision for receiving incompetent evidence ordinarily, but where they fail to audit the bill properly, in neglecting to pass upon the items of the relator's claim, their determination should be set aside under subdivision 3 of § 2140, as the allowance of a gross sum instead of passing upon the items is not a proper audit. *People ex rel. Sutliff v. Supervisors*, 74 Hun 255, 55 St. Rep. 891. While the Supreme Court has power, under § 2140 of the Code Civ. Proc., to hear evidence and set aside a verdict, yet the Court of Appeals has no such power. If there is any evidence fairly sustaining the determination, the Court of Appeals will not interfere therewith. Nevertheless, where there is no real conflict in the evidence, and there is thus a substantial failure in evidence to sustain a determination, the Court of Appeals will review the same and reverse the decision. *People ex rel. Coyle v. Martin*, 142 N. Y. 354, 59 St. Rep. 25. Section 2140 of the Code Civ. Proc. regulates the jurisdiction of the court in respect to the questions to be reviewed, and the following § 2141, regulating the mode in which the determination shall be declared, does not enlarge the jurisdiction prescribed by § 2140. *People ex rel. Kent v. Board of Fire Commissioners*, 100 N. Y. 82.

Under § 2140, regulating the matters to be determined by the court upon the hearing, the question whether there was a failure to give the two days' notice of trial prescribed by the rules of the police department, where charges have been preferred against a member of the police force, is a matter essential to the jurisdiction of the police commissioners to try the relator, and the question may be determined upon *certiorari*. Note subdivision 2 of this section. *People ex rel. Jordan v. Martin*, 152 N. Y. 317.

Under subdivision 5 of § 2140, the General Term may set aside the adjudication of police commissioners in disciplining an officer on the merits, although there may be some evidence to sustain it; if the preponderance of truth is such that if the facts had been found by a jury on the trial of an issue in the Supreme Court, the verdict would be set aside as against the weight of evidence. But such review of the merits is ended with the decision of the General Term, and on appeal only questions of law will be

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considered. *People ex rel. O'Callahan v. French*, 123 N. Y. 636, 33 St. Rep. 599.

Under § 2140, the Supreme Court may inquire not only whether there was competent proof of all the facts necessary to be proved in order to authorize police commissioners in making a determination, removing an officer, but it must also look into the evidence, and if it finds that there is a preponderance against the determination of the commissioners, it has the same jurisdiction to reverse the determination that it now has to set aside the verdict of the jury as against the weight of the evidence. *People ex rel. Mahoney v. McLean*, 33 St. Rep. 966, 11 Supp. 487. However, where there is no preponderance of evidence, such as would allow a verdict to be set aside, the same controlling effect must be given to the decision, as to facts of the police commissioners, as would be given to the decision of a jury. *People ex rel. Dolan v. McLean*, 32 St. Rep. 839, 11 Supp. 111. Under subdivisions 4 and 5 of § 2140, the power of the court is no greater than it would be over the verdict of a jury rendered on the trial of an action. Where the verdict of a jury would be conclusive as to facts, the court cannot set aside the decision of commissioners as to the same facts. *People ex rel. Winchell v. McLean*, 36 St. Rep. 999. It seems that the determination of the board of assessors as to who was benefited by an improvement, and the extent of such benefit, of which questions they are made exclusive judges by the city charter, cannot be reviewed upon *certiorari* except for errors of law. *People ex rel. Davidson v. Gilon*, 126 N. Y. 157; *People ex rel. James v. Gilon*, 37 St. Rep. 23. The statute by § 2140, Code Civ. Proc., has extended the operation of the writ of *certiorari* beyond what it had at common law. Not only may the court inquire into the jurisdiction of the body or officer making the determination which is the subject of review, and whether it has pursued the mode required by law, but also whether any legal rules have been violated to the prejudice of the relator; and it may examine the facts so far as to ascertain whether the determination was supported by the evidence or was against the preponderating weight of evidence. *People ex rel. Cook v. Hildreth*, 126 N. Y. 364, 37 St. Rep. 393.

The decision of the comptroller in determining an application for the revision and readjustment of taxes stands in some respects like the verdict of the jury, and should not, under Code

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Civ. Proc., § 2140, subdivision 5, be set aside, except upon reasons that would justify the court in setting aside the verdict as against evidence. *People ex rel. A. C. & D. Co. v. Wemple*, 60 Hun, 234, 38 St. Rep. 23, 14 Supp. 863. While the return to *certiorari* at common law was deemed conclusive unless traversed, yet this rule does not apply to *certiorari* to review assessments, and any such proceeding, notwithstanding that the return takes issue with material allegations in the petition, or avers new matter, the court at the hearing may order proofs to be taken, and the testimony so taken and reported shall be considered by the court in making its determination. *People ex rel. S. B. R. R. Co. v. Cheetham*, 20 Abb. N. C. 48.

(See note to this case for collection of authorities on the practice in *certiorari* to review assessments.)

The decision of the police commissioners in removing a police officer is not reviewable on *certiorari* where the rules governing the force authorize a dismissal from the service, and the question of the sufficiency of the officer's excuse for dereliction of duty is addressed solely to the discretion of the commissioners. Such a case is not within the provisions of § 2140, subdivision 5. *People ex rel. Masterson v. French*, 110 N. Y. 498. But the court, in reviewing by *certiorari* the proceedings of police commissioners in dismissing an officer, may inquire whether there was competent proof of the charges made, and if so, whether there was such a preponderance of evidence against it as would justify setting aside the verdict of jury. *People ex rel. Welch v. French*, 15 St. Rep. 109. In this case it was held that the needless use of his club by an officer in violation of a rule prohibiting the use of the same, except in self-defence, was sufficient grounds for dismissal. In *certiorari* under the proceedings to review assessment, the court will confirm the determination of the assessors, unless on all the evidence there is such a preponderance against the facts found by the assessors that the verdict of a jury finding same would have been set aside. *People ex rel. Carter v. Williams*, 20 Supp. 351, 48 St. Rep. 208. Errors in the reception or rejection of evidence by the tribunal whose proceedings are under review, should be disregarded by the court if the tribunal has jurisdiction of subject-matter of the investigation, and had conducted its proceedings in the mode required by law, in order to authorize it to make the determina-

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tion, where there is sufficient competent evidence upon which the tribunal would be authorized to reach the determination which it made. So held in *certiorari* to review the proceedings of the common council of a city in removing the city attorney. *People ex rel. Burbey v. Common Council*, 85 Hun, 612, 67 St. Rep. 3, 33 Supp. 165. Likewise it has been held that the decision of State assessors in admitting evidence is not a violation of subdivision 3 of § 2140, Code Civ. Proc., as it does not violate "any rule of law affecting the rights of the relators." It seems, however, that a refusal to receive evidence absolutely essential to the protection of either of the parties would constitute an erroneous ruling of law affecting the rights of the parties within the subdivision of this section. *People ex rel. Schabacker v. State Assessors*, 47 Hun, 452, 14 St. Rep. 309, limiting *People ex rel. Supervisors of Chenango County v. Board of State Assessors*, 22 Week. Dig. 453.

The court upon *certiorari* will review the decision of the board of police commissioners refusing to adjourn the trial of a policeman, where the latter through illness is unable to attend and where such refusal is an abuse of discretion. *People ex rel. Devery v. Martin*, 13 Misc. 22, 67 St. Rep. 850, 33 Supp. 1000. Where a determination of an inferior tribunal has been reversed on *certiorari* by the court, on the ground of being against the weight of evidence, such reversal will not be reviewed by the Court of Appeals. The court, however, goes on to say, "We do not mean to say that under no circumstances should we review such determination. In cases involving a plain violation of the well-known rule governing applications for a new trial, on the ground that the verdict is against the weight of evidence, and when it could be seen that there was an abuse of the discretion of the court and possibly in some other cases this court might review the decision of the lower court." It is further held in this case that § 2140 of the Code of Civil Proc. providing that questions involving the merits may be determined by the court upon a hearing does not apply to a hearing on appeal to the Court of Appeals and does not enlarge the jurisdiction of the appellate court. The section is confined in its operation to the tribunal issuing the writ. *People ex rel. McCabe v. Board of Fire Commissioners*, 106 N. Y. 261, 8 St. Rep. 698.

Under subdivision 5 of § 2140 the decision of police commis-

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sioners discharging an officer will be reversed and annulled, if the relator had no notice or opportunity to meet the charge upon which his dismissal was based. *People ex rel. Lee v. Doolittle*, 44 Hun, 295. (The reviser's note to § 2140, Code Civ. Proc., states that the section was framed to settle the law as to the questions to be reviewed under the writ and that it was intended to embody the rule as laid down in the cases.) Though § 2140, Code Civ. Proc., applies only to civil proceedings, yet it has been used by the court as a guide to determine questions involved in criminal proceedings. *People ex rel. Wright v. Court of Sessions*, 45 Hun, 57, 9 St. Rep. 609.

Where the decision of the police commissioners discharging an officer has been annulled because of its refusal to admit testimony, the relator cannot afterwards object to a rehearing before the commissioners, on the ground that he is tried the second time for the same offence. *People ex rel. McCormack v. McClave*, 29 St. Rep. 369. Where the board of railroad commissioners issues a certificate of public convenience and necessity, under § 59 of the Railroad Laws, it does not violate any rule of law affecting the rights of a rival railroad applying at the same time for the same certificate. *People ex rel. Depew R. Co. v. Commissioners*, 4 App. Div. 266. Though the evidence upon which police commissioners discharge a policeman for misconduct is conflicting, yet when there is sufficient evidence to show his alleged offence, the order discharging him will not be reversed on *certiorari*. *People ex rel. Irving v. French*, 6 Supp. 394. The court has power to determine upon *certiorari* whether the action in discharging an officer is supported by a preponderance of proof. See *People ex rel. Strauss v. Roosevelt*, 2 App. Div. 538; *People ex rel. Brady v. French*, 11 St. Rep. 577. A writ of *certiorari* should be quashed without considering the merits for failure to prosecute for six years. *People ex rel. v. French*, 53 Hun, 637, 6 Supp. 431. A writ of *certiorari* issued to review the rejection of a claim by a town board of auditors should be quashed if issued after the schedules of audited accounts have been delivered to the supervisor, as upon such delivery the jurisdiction of the auditors terminates. *People ex rel. v. Board of Auditors of Hannibal*, 65 Hun, 414, 20 Supp. 165.

It is not the practice to quash the writ at a hearing where there is a return. Upon such hearing the court should make a

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final order, either annulling, confirming, or modifying the determination under review. *People ex rel. W. S. R. R. Co. v. Pitman*, 9 St. Rep. 469. The writ will not be quashed, though the application therefor failed to state that no previous application for the writ had been made. *People ex rel. Brodie v. Cox*, 14 St. Rep. 632. If a tribunal, whose decision is under review, had jurisdiction and proceeded according to law and there is competent evidence to sustain the determination, errors in the reception or rejection of evidence will be disregarded. *People ex rel. Burby v. Common Council of Auburn*, 85 Hun, 601, 67 St. Rep. 3, 33 Supp. 165. Objections not made before the board, whose decision is under review, cannot be considered upon the hearing. *People ex rel. Hecker, Jones, Jewell Milling Co. v. Barker*, 67 St. Rep. 755, 33 Supp. 1019. A motion to amend the writ by setting up additional grounds cannot be made upon the argument of the case. *People ex rel. Gould v. Barker*, 14 Misc. 586, 70 St. Rep. 626, 35 Supp. 225. The legality of a municipal board cannot be questioned on *certiorari*, since the writ assumes its legal existence. *People ex rel. v. Hayden*, 7 Misc. 292, 27 Supp. 893. In *certiorari* to review the action of police commissioners in removing an officer, matters presented by the return as to which the relator was not tried should be disregarded. *People ex rel. v. Hannan*, 56 Hun, 469, 10 Supp. 71, affirmed, 125 N. Y. 691. Where a county court has affirmed the report of commissioners under the Highway Law, chapter 568, Laws 1890, which decision laid out a highway, the same cannot be reviewed by *certiorari*, because the act provides that the decision of the county court shall be final, excepting that a new hearing may be ordered. *People ex rel. D. L. & R. R. Co. v. County Court*, 4 App. Div. 543.

ARTICLE IX.

FINAL ORDER AND ITS EFFECT. §§ 2141, 2142, 2144, 2145,
2143, 3253.

§ 2141. Final order upon the hearing.

The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.

§ 2142. Restitution may be awarded.

Where the determination reviewed is annulled or modified, the court may order

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and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.

§ 2144. Entry and enrollment of final order.

The final order of the court upon the *certiorari* must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose, the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order, and a certified copy of each order, which in any way involves the merits, or necessarily affects the final order.

See §§ 1237, 1345, and 1354.

§ 2145. Effect thereof.

The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the Court of Appeals, the proceedings below are stayed in like manner.

§ 2143. Costs.

Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court.

§ 3253. [Am'd, 1896, 1898.] Additional allowance to either party in difficult cases, etc.

In an action brought to foreclose a mortgage upon real property, or for the partition of real property, or in a difficult and extraordinary case (where a defence has been interposed in an action), or, except in the first and second judicial districts, in a special proceeding by *certiorari* to review an assessment, under chapter two hundred and sixty-nine of the laws of eighteen hundred and eighty, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

1. In an action to foreclose a mortgage or for the partition of real property, a sum not exceeding two and one-half per centum upon the sum due or claimed to be due upon the mortgage nor the aggregate sum of two hundred dollars.

2. In any action or special proceeding specified in this section, where a defence has been interposed, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved.

L. 1896, ch. 571; L. 1898, ch. 61. In effect Sept. 1, 1898.

It was held, previous to the enactment of § 2141, that the Supreme Court could only affirm or reverse the proceedings of court below on *certiorari*. *Baldwin v. Calkins*, 10 Wend. 167; *People v. City of Brooklyn*, 14 Abb. (N.S.) 115; *People v. Ferris*, 36 N. Y. 218. It was thought by the codifiers that this rule, in many instances, worked injustice, and the foregoing section was prepared for the purpose of extending the power of the court on *certiorari*, so as to correspond to the power vested in the Court of Appeals and the Supreme Court upon appeals from orders in special proceedings as well as in actions. It is further observed

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that the section is so drawn as to confine the power of modification to the determination appealed from and to the parties before the court. The provisions of the Code of Civil Procedure, § 2141, authorizing the court, upon a hearing on return to a writ of *certiorari*, to make a final order annulling or confirming, wholly or partly, or modifying the determination reviewed, does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion.

It is to be read in connection with § 2140, which defines the questions which may be determined on *certiorari*, and simply gives power to correct an erroneous determination instead of reversing it absolutely. Where, therefore, the General Term on *certiorari* modified an order, and there was no question of jurisdiction, procedure, or evidence, giving the General Term jurisdiction, *held*, error. *People v. Board of Fire Commissioners*, 100 N. Y. 82.

Section 2141 of Code Civ. Proc., though it authorizes the court upon the hearing to the writ of *certiorari* "to make a final order annulling or confirming wholly or partly or modifying the determination to be reviewed," does not, nevertheless, authorize the review or modification of decisions of inferior tribunals in matters in which they had discretion and which are within their jurisdiction. Thus where commissioners have discharged a fireman after a trial, their decision as to the nature and extent of the punishment within the limits of the statute is not reviewable by the court, as the same is within their discretion. *People ex rel. Burns v. Purroy*, 46 St. Rep. 910, 19 Supp. 713; *People ex rel. Kent v. Board of Fire Commissioners*, 100 N. Y. 84; see, also, *People ex rel. Masterson v. French*, 110 N. Y. 498. In proceedings upon *certiorari* the court can grant no additional relief, it has authority only to annul, confirm, or modify the determination to be reviewed. *People ex rel. Forest Commission v. Campbell*, 22 App. Div. 174. Where the refusal of a town board to audit a claim at its full amount violated a rule of law, the court in its decision may amend the audit, and allow the full amount of the claim. *People ex rel. Groton Bridge Co. v. Town Board of Campbell*, 92 Hun, 585, 72 St. Rep. 82, 36 Supp. 1062. In *certiorari* to review the legality of an assessment, the court has power to correct the assessment, under the authority of

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§ 2141, by striking out the names of non-residents and leaving an assessment for the full amount against the relator. *People ex rel. Neustadt v. Coleman*, 42 Hun, 586. The court will reverse and annul a decision of police commissioners removing an officer where it has not been done after a proper trial upon charges preferred against him. So held where the policeman had been discharged upon an accusation which he had not had an opportunity to meet. *People ex rel. Lee v. Doolittle*, 44 Hun, 295. See, however, *People ex rel. McCabe v. Board of Fire Commissioners*, 106 N. Y. 261, 8 St. Rep. 698, holding that, where the court in which the hearing was originally had, has determined the questions and has reversed the decision of an inferior tribunal, the Court of Appeals will not review such decision. Yet it seems that even in such case where there has been an abuse of the discretion of the court below in its decision upon such hearing, the Court of Appeals will review such decision. *People ex rel. McCabe v. Board of Fire Commissioners*, 106 N. Y. 264, 8 St. Rep. 700. Where the judgment of police commissioners dismissing an officer from the police force in New York City was rendered upon conflicting testimony, such judgment will not be reversed unless there is such a clear preponderance of proof against it, as to warrant the belief that it resulted from passion, prejudice, or mistake. The court said: "The rules which govern an appellate court in reviewing the verdict of a jury apply here with equal if not greater force." *People ex rel. Shaefer v. Martin*, 28 App. Div. 74, 50 Supp. 897.

For a case where the dismissal of a policeman from the force was reversed as against the weight of evidence. *People ex rel. Walker v. Roosevelt*, 26 App. Div. 183, 49 Supp. 975. In this case the testimony was founded upon the testimony of a roundsman, who saw the relator drinking something from a glass which had been brought to him while on duty and who thereupon accused him of intoxication. The court says: "We thus have the roundsman making this serious charge upon mere suspicion, for he is forced to admit that he could not see the contents of the glass." This charge having fallen through upon the hearing, the roundsman preferred a second charge, that the policeman had used vile and insulting language to him on the way to the station-house, which testimony was refuted by three unimpeached and disinterested witnesses. Upon this latter charge conviction was

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had. *Held*, that it should be reversed as against the weight of evidence. Rumsey and Patterson, JJ., dissenting.

The decision of the comptroller in deciding whether property within his jurisdiction is taxable, which is his duty by statute, will not be set aside unless it is evident that the valuation is erroneous. *People ex rel. A. C. & D. Co. v. Wemple*, 60 Hun, 234. Before the court will reduce or modify an assessment made by the comptroller having jurisdiction of the party and subject-matter, it must be made to appear affirmatively that the assessment is in part or in whole erroneous. *People ex rel. E. E. I. Co. v. Wemple*, 61 Hun, 65. Dissenting opinion of Mayham, J. It seems that upon *certiorari* to review assessments where the board of assessment is, by city charter, made exclusive judge as to whether property has been benefited by an improvement, the court will not review the determination of the board upon such a question, except for errors of law. *People ex rel. Davidson v. Gilon*, 126 N. Y. 157.

It seems that where a school trustee in making an assessment has jurisdiction of the persons and subject-matter taxed, the fact that the tax is erroneous does not invalidate the whole assessment because such error may be corrected and modified under § 2141, Code Civ. Proc., *Norris v. Jones*, 7 Misc. 202 ; see same case on appeal 81 Hun, 313. An order appointing commissioners under chapter 568, Laws 1890, to certify as to the necessity of ordering a highway, if properly made, cannot be reviewed upon *certiorari* under the Code of Civ. Proc., nor can their determination be annulled wholly or partly, or modified under § 2141, because under the statute the county court may confirm or vacate such report of commissioners and review all the proceedings in laying out a highway, thus furnishing an adequate remedy. *People ex rel. Hanford v. Thayer*, 88 Hun, 137, 68 St. Rep. 281. Where a relator has been unlawfully discharged from a public office in anticipation of an event in which his discharge might have been lawful, the court in reinstating him will not so modify the decision of the court below as to allow him only salary to the date upon which he might have been properly discharged. He is entitled to be restored to the position. *People ex rel. Dean v. Brookfield*, 1 App. Div. 70. It should be noted that under the statutory writ of *certiorari* to review assessment there is in effect a new trial of the entire issue, and the court may

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decide all matters *de novo*. *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 431.

Section 2142 is practically an amplification of the preceding section, and gives a further statement that the court upon annulling or modifying a decision may order and enforce restitution in like manner and with like effect, and subject to the same conditions as where a judgment is reversed upon appeal. Compare §§ 1292 and 1323, Code Civ. Proc., regulating final restitution when a final judgment or order is reversed or modified upon appeal. See the case of *Haebler v. Myers*, 132 N. Y. 367, 44 St. Rep. 405, 28 Abb. N. C. 179, which discusses the nature of restitution.

These statutes as to restitution, it seems, were enacted in recognition of the right of restitution as it existed at common law, and furnished an additional means of enforcing that right. The right is not exclusive but cumulative, and the remedy is exercised by the entry of a judgment or order in the action in which the erroneous judgment or order was rendered or made. Compare also *Matter of Assignment of Wiltse & Fromer*, 5 Misc. 114. Where there has been an erroneous assessment, and such assessment had been paid, the whole determination need not be reversed but may be modified, and restitution may be ordered under § 2142, Code Civ. Proc., to those who have so paid the assessment. *People ex rel. N. Y., O. & W. R. R. Co. v. Chapin*, 42 Hun, 241.

The rule governing costs in *certiorari* under Code Civil Procedure, § 2143, has no application to *certiorari* to review assessment under chapter 269, Laws 1880. Under § 6 of said law costs shall not be awarded against assessors or other officers whose proceedings may be reviewed under this act, unless it shall appear to the court that they acted with gross negligence, with bad faith, or with malice. *People ex rel. Niagara Falls Co. v. Russell*, 57 Hun, 55, 10 Supp. 392, 32 St. Rep. 21; see *People ex rel. Scrafford v. Stedman*, 57 Hun, 281, 10 Supp. 789, 32 St. Rep. 652, for costs awarded in the discretion of the court under § 2143, Code Civ. Proc., on *certiorari* directed to commissioners of highways, to review an order laying out a road.

The provisions of § 2143, Code Civ. Proc., do not apply to *certiorari* to review assessment. The costs allowed on *certiorari* to review assessment are those allowed in an ordinary action. *People ex rel. Fairchild Co. v. Colemau*, 18 Abb. N. C. 247. See *Pco. ex rel. Lee v. Doolittle*, 44 Hun, 295, for discretionary costs

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given under § 2143 in *certiorari* where the decision of police commissioners discharging an officer are wholly reversed and annulled.

No costs were allowed on a writ of *certiorari* at common law. The subject is discussed and reasons given and explained. *People v. Metropolitan Police Board*, 39 N. Y. 506. There was much conflict over this question under the Code of Procedure, and the question seems to have been decided in favor of the allowance of costs as a special proceeding. *People v. Fuller*, 40 How. 35. The decisions under the present statutes have been under the provisions of chap. 269, Laws of 1880, providing for the review of assessments by *certiorari*, and will be more fully referred to under that head. They are *People v. Keator*, 67 How. 277; *People v. Peterson*, 16 Week. Dig. 70; *People v. Keator*, 36 Hun, 592; *People v. Fonda*, 22 Week. Dig. 477. Where the judgment of a court-martial is brought into the Supreme Court on a writ of *certiorari*, and there reversed, the respondent is personally liable for costs awarded by the final order and may be adjudged guilty of contempt for non-payment. See § 2007; *Matter of Leary*, 30 Hun, 394.

Under §§ 2144-2145, no formal judgment seems necessary, beyond the final order; under the former practice a very elaborate judgment was entered.

If judgment is desired it may be entered in the usual form of judgment of affirmance, or dismissing writ, as the case may be.

Precedent for Order Dismissing Writ.

At a General Term of the Supreme Court of the State of New York, held in and for the third judicial department of said State, at the court-house in the city of Albany, on the 31st day of May, 1884:

Present:—Hon. Wm. L. Learned, *Presiding Justice*; Hons. Augustus Bockes and Douglass Boardman, *Associate Justices*.

The People of the State of New York, on the
Relation of Louis Bevier, Supervisor of the
Town of Marbletown, and the Town of
Marbletown

agst.

The Board of Supervisors of the County of
Ulster.

This matter, coming on to be heard on the petition, writ of *certiorari*

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and return thereto, and after hearing J. J. Linson, Esq., counsel for the relators, and E. B. Walker, Esq., counsel for the respondent,

Ordered, that the writ of *certiorari* herein granted and tested on the 7th day of December, 1883, and the proceedings thereon, be and the same hereby is dismissed, with fifty dollars costs and disbursements to the respondent.

JOHN W. WALSH,

Deputy Clerk.

Judgment on Order Dismissing Writ.

(Title.)

This matter, coming on to be heard on the petition, writ of *certiorari* and return thereto, and after hearing J. J. Linson, Esq., counsel for relators, and E. B. Walker, Esq., counsel for respondent,

It is ordered and adjudged that the writ of *certiorari* herein granted and tested on the 7th day of December, 1883, and all proceedings thereon, be and the same hereby is dismissed.

It is further ordered and adjudged that the board of supervisors of the county of Ulster, the respondent herein, recover of the town of Marbletown and Louis Bevier, supervisor of said town of Marbletown, the sum of fifty dollars costs, and fourteen and 25-100 dollars disbursements, making in all the sum of sixty-four and 25-100 dollars.

MARTIN S. DECKER,

Deputy Clerk.

An evasion of an order granted on *certiorari* compelling a commissioner of correction of the city and county of New York to reinstate the relator to his office of warden in the prison, is a contempt, and an order committing such commissioner for contempt is proper. In this case the relator succeeded in his application for a reinstatement, and the order on *certiorari* required the commissioner "to restore him the possession of the State office or position, and the rights, powers, privileges, and emoluments thereof." The commissioner made an order stating that two wardens were necessary, and continued another appointee to serve during the day, the period during which the duties of a warden were performed, and reinstated the relator as a warden to serve only at night which merely constituted him a night watchman. It was held that such action by the commissioner was merely a shallow pretext for disobeying the order of the court and was punishable as a contempt. *People ex rel. Fallon v. Wright*, 22 App. Div. 167.

ARTICLE X.

RESTRICTION ON THE RIGHT TO THE WRIT. §§ 2147-2148.

§ 2147. Application of this article to certain special cases.

Where the right to a writ of *certiorari* is expressly conferred, or the issuing thereof is expressly authorized, by a statute, passed before, and remaining in force after this article takes effect, this article does not vary, or affect in any manner, any provision of the former statute, which expressly prescribes a different regulation, with respect to any of the proceedings upon the *certiorari* to be issued thereunder.

§ 2148. Id.; to civil cases only.

This article is not applicable to a writ of *certiorari*, brought to review a determination made in any criminal matter, except a criminal contempt of court.

As proceedings for criminal contempt are not provided for in the Criminal Code, it has been held that, by virtue of § 2148, Code Civ. Proc., an order punishing one for criminal contempt may be reviewed by *certiorari*, and such has always been the practice. *People ex rel. Taylor v. Forbes*, 143 N. Y. 223, 62 St. Rep. 175, 38 N. E. Rep. 303; see, also, *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N. Y. 245; *People ex rel. Choate v. Barrett*, 56 Hun, 351, 121 N. Y. 678; *People ex rel. Negus v. Dwyer*, 90 id. 402. (See title Criminal Contempt.)

Following the decision of *People ex rel. Taylor v. Forbes*, 143 N. Y. 223, 62 St. Rep. 175, 38 N. E. Repr. 303, *supra*, the General Term held that the determination of the court punishing a person for criminal contempt, may be reviewed by *certiorari*; notwithstanding § 515 of the Code Criminal Procedure, which provides that: "Writs of error and of *certiorari* in criminal actions and proceedings and special proceedings of a criminal nature . . . are abolished, and hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding or special proceedings of criminal nature is by appeal." *People ex rel. Barnes v. Court of Sessions*, 82 Hun, 258, 63 St. Rep. 821, 31 Supp. 373; see 147 N. Y. 290. Though the provisions of the Code of Civ. Proc. on *certiorari* to review apply only to civil proceedings, yet § 2140 of the Code Civ. Proc., which regulates the questions to be determined upon a hearing of *certiorari*, has been used by the court as a guide in criminal proceedings. *People ex rel. Wright v. Court of Sessions*, 45 Hun, 57, 9 St. Rep. 609.

It should be remembered that *certiorari* to review assessment, as provided by the Tax Law, is a different and separate proceeding from *certiorari* to review under the Code, and the Code provi-

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sions do not apply. *People ex rel. N. Y., etc., R. R. Co. v. Low*, 40 Hun, 177; *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 430.

ARTICLE XI.

APPEALS.

An order of the appellate division simply dismissing a common-law writ of *certiorari* without affirming the proceedings, or in any way passing upon the questions sought to be reviewed, is a discretionary order, and is not reviewable by the Court of Appeals. The discretionary character of an order dismissing such writ cannot be altered by recourse to the opinion of the court below. *People ex rel. Coler v. Lord*, 157 N. Y. 408, dismissing appeal from 29 App. Div. 455.

Where an objection on the ground of non-joinder of defendants is taken for the first time on an appeal from an order dismissing a *certiorari* on other grounds, the appellate court may permit an application to be made to the Special Term to vacate the order and allow an amendment to the writ. *Peo. ex rel. Benedict v. Roc*, 25 App. Div. 107, 49 Supp. 227, 83 St. Rep. 227. An appeal from a decision on a writ of *certiorari* to review assessment, under chapter 269, Laws of 1880, is limited imperatively by that law, and not by the Code of Procedure. *People v. Keator*, 101 N. Y. 610. When the writ is quashed below, under the well-settled practice of the Court of Appeals, the appeal to that court must be dismissed. This is upon the ground that the granting or withholding of the writ is discretionary with the Supreme Court. *People v. Board of Police Commissioners*, 82 N. Y. 506, citing *In re Mount Morris Square*, 2 Hill, 14; *People v. Stilwell*, 19 N. Y. 531; *People v. Hill*, 53 id. 549; *People v. Board of Fire Commissioners*, 77 id. 605, and distinguishing *People v. Board of Assessors*, 39 id. 81, which seems to hold a different rule; *People v. Commissioners, etc.*, 103 N. Y. 370, cases cited in points of attorney-general. *People v. McCarthy*, 102 N. Y. 630. The court says, in *People v. Hancock*, 85 N. Y. 655, we have many times decided that an appeal to this court is not allowed from a decision of the Supreme Court quashing a writ of *certiorari*. If, in this case, judgment had been granted affirming the action of the commissioners of taxes an appeal would lie. There thus appears to be a distinction as to the form of the order of the General Term,

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and in case an appeal is desired, the order should be one of affirmance of the action of the inferior tribunal and not quashing the writ.

It is again held in *People v. Board of Police Commissioners*, 86 N. Y. 639, that an order quashing a writ of *certiorari* is not reviewable in that court. It is held, in *People v. Fire Commissioners*, 82 N. Y. 360, that on a common-law *certiorari* the court will examine the record, not only for the purpose of seeing whether the subordinate tribunal kept within its jurisdiction, but also to ascertain whether there was any legal proof of facts authorizing the adjudication, and whether any rule of law affecting the relator has been violated (citing *People v. Board of Commissioners*, 69 N. Y. 408); and further, that if the tribunal had jurisdiction, and there was evidence legitimately tending to support its decision, and no rule of law was violated, the adjudication is final and cannot be reviewed upon *certiorari*, because the evidence upon which it proceeded was weak or inconclusive, or because the court issuing the writ would, if the case had originally been presented for its decision, have decided differently upon the facts. The question of what is reviewable in the Court of Appeals, on appeal from a common-law *certiorari*, was fully discussed in *People v. French*, 92 N. Y. 306, and it was held that the court would look into the record only for the purpose of seeing whether the subordinate tribunal has kept within its jurisdiction, based its decision upon some legal proof of the facts authorizing it, and violated no rule of law in its proceedings affecting the right of relator. It is further held that § 2140 does not require such a review as would require the examination of evidence; that the section refers to the court hearing the proceedings on the return of the writ, and must necessarily be confined to the court in which such hearing is had. In *People v. Board of Police Commissioners*, 93 N. Y. 101, it is assumed that the rule is that the facts involved in the determination must be satisfactorily supported by evidence, so that the verdict of a jury finding such fact would not be set aside as against the weight of evidence, yet only error of law can be reviewed in that court, and the evidence examined to see that there is competent proof to justify the decision made. But where an order is made denying a motion to quash the writ issued in a case not reviewable by *certiorari*, an appeal may be taken to the Court of Appeals, dis-

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tinguishing *Jones v. People*, 79 N. Y. 45, which holds that where a *certiorari* has been lawfully issued, it is a matter of discretion whether the Supreme Court will quash; but if unlawfully or illegally issued, the appellate court may pass upon, and might, of its own motion, quash the writ. *People v. Board of Commissioners*, 97 N. Y. 37. In *People v. McCarthy*, 102 id. 635, it is held that since § 2127 makes the allowance of the writ of *certiorari* discretionary with the court, an order quashing the writ is not appealable to the Court of Appeals. That if the court in making the order had refrained from exercising its discretion upon the question presented, and had quashed the writ upon the ground of a want of power to issue it, or had quashed it in a case not authorized by law, the court could properly have reviewed the questions presented by an appeal from such determination (citing 97 N. Y. 37, *supra*): "But in a case where that court has exercised its discretion with respect to the allowance or denial of the writ, and has refused to grant it on the ground that it ought not, under all the circumstances of the case, to have been issued, this court has no jurisdiction to review its determination, and so it has repeatedly held." Citing 19 N. Y. 531, 53 id. 547, 85 id. 655. But in a case where, although the order concluded by directing that the writ be quashed, that conclusion was preceded by an adjudication, that the proceeding brought up by the writ was valid and free from error, and the judgment quashing the writ was not rendered in the exercise of the discretion of the court, and on the grounds that the proceeding ought not to be reviewed by the writ, it presents questions of law reviewable in Court of Appeals. *People v. Commissioners*, 103 N. Y. 370. As the law now stands, under the Code the Supreme Court is at liberty to review the evidence, and to review the decision whenever it would feel justified in setting aside a verdict upon the same evidence as against the weight of evidence. *People v. Board of Fire Commissioners*, 30 Hun, 376. In reviewing the decision of the canal board on *certiorari* from the canal appraisers, the court can only inquire whether these bodies have kept within their jurisdiction; it cannot consider the merits or any alleged irregularities not jurisdictional. *People v. Canal Board*, 29 Hun, 159. And the writ will not issue to review proceedings of the canal board while an appeal is pending. *People v. Dennison*, 28 Hun, 328.

CHAPTER IX.

DISCHARGE OF INSOLVENT DEBTOR FROM HIS DEBTS.

(TWO-THIRDS ACT.)

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ARTICLE I.

WHO MAY BE DISCHARGED AND BY WHAT COURT.

§ 2149. Who may be discharged.

An insolvent debtor, who is a resident of the State at the time of presenting his petition, may be discharged from his debts, as prescribed in this article.

2 R. S. 16, § 1 (2 Edm. 17), amended.

§ 2150. [Am'd, 1895.] To what court application to be made.

Application for such a discharge must be made by the petition of the insolvent, addressed to the county court of the county in which he resides; or, if he resides in the city of New York, to the Supreme Court.

The act for relief of debtors on proceedings similar to those herein provided for was originally known as the Three-Fourths Act, and was modified and subsequently enacted by the Revised Statutes so as to require the consent of two-thirds instead of three-fourths of the creditors. The history of the legislation on the subject in the State is given in detail in an elaborate opinion in *American Flask Co. v. Son*, 7 Robt. 233, and the decisions on the subject collated, compared, and discussed. The act will be construed strictly, and all proceedings under it must fully comply with its provisions, since it is in derogation of the common law, and such strict compliance with the statute is a condition precedent to the discharge of an insolvent from his debts. Nor, in view of the fact that it is designed to deprive creditors of all remedy for the collection of their debts, will it be extended by implication beyond the fair and legitimate meaning of the terms employed by the legislature. *Salters v. Tobias*, 3 Paige, 339; *People v. Striker*, 24 Barb. 649; *People v. Sutherland*, 16 Hun, 192; *Merry v. Sweet*, 43 Barb. 475; *Stanton v. Ellis*, 12 N. Y. 575; *Morrow v. Freeman*, 61 id. 515. The question of what is sufficient evidence under the Revised Statutes to enable an insolvent to come within the statute was discussed in *Matter of*

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Wrigley, 4 Wend. 602, affirmed, 8 id. 134, where it was held that it must be a *bona fide* residence with intent to remain a resident of the State. The matter of residence is jurisdictional. *Otis v. Hitchcock*, 6 Wend 433; *Morewood v. Hollister*, 6 N. Y. 309. An unliquidated claim for damages arising out of a tortious act is not a debt within the provisions of the statute authorizing a discharge of an insolvent. *Zinn v. Ritterman*, 2 Abb. (N. S.) 261. If an application has already been made to the Common Pleas, and after a full hearing has been decided against the debtor on the merits, it should be regarded as *res adjudicata*, and the application denied. *Matter of Roberts*, 10 Hun, 253, reversed on another point, 70 N. Y. 5.

Under § 2149, requiring that the insolvent debtor must be a resident of the State at the time of presenting his petition, the term "resident" means domiciled, either for the purpose of living or business, and one who having an actual domicil in New Jersey, but spending part of the year at a club-house, owned by him with others, in the Catskill Mountains, is not a resident within the meaning of this section. *Matter of Dimmock*, 4 App. Div. 305, and the court is not precluded in its decision as to the petitioner's domicil by his testimony. *Matter of Dimmock*, reported below, 11 Misc. 613, 66 St. Rep. 354, 24 Civ. Proc. 313.

The jurisdiction of the court to entertain proceedings for an insolvent's discharge from his debts is a special jurisdiction, and depends upon a strict compliance with the statute. If there appear upon the face of the papers the lack of any of the statutory requirements, the court is without jurisdiction, and a discharge based thereon is void. *Matter of Cohen*, 16 Daly, 70, 9 Supplement, 498, 18 Civ. Proc. 157; compare *Bullymore v. Cooper*, 46 N. Y. 236.

ARTICLE II.

THE PETITION AND ACCOMPANYING PAPERS.

§§ 2151 to 2163.

§ 2151. Contents of petition.

The petition must be in writing; it must be signed by the insolvent, and specify his residence; it must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of this article, for the purpose of being

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discharged from his debts; and it must pray that, upon his so doing, he may be discharged accordingly. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true, in matter of fact.

§ 2152. Consent of creditors to be annexed.

The petitioner must annex to his petition one or more written instruments, executed by one or more of his creditors, residing in the United States, having debts owing to him or them in good faith, then due or thereafter to become due, which amount to not less than two-thirds of all the debts, owing by the petitioner to creditors residing within the United States. Each instrument must be to the effect, that the person or corporation, executing it, consents to the discharge of the petitioner from his debts, upon his complying with the provisions of this article.

2 R. S. 36, § 2 (2 Edm. 37).

§ 2153. Consent of executor, administrator, receiver, etc.

An executor or administrator may become a consenting creditor, under the order of the surrogate's court from which his letters issued. A trustee, official assignee, or receiver of the property of a creditor of the petitioner, whether created by operation of law or by the act of parties, may become a consenting creditor under the order of a justice of the Supreme Court. A person who becomes a consenting creditor, as prescribed in this section, is chargeable only for the sum which he actually receives, as a dividend of the insolvent's property.

2 R. S. 36, § 3, and L. 1850, ch. 210, § 1 (4 Edm. 482), am'd and consolidated.

§ 2154. Id.; of corporation, etc.

Where a corporation or joint-stock association becomes a consenting creditor, its consent must be executed under its common seal, and may be attested by any director or other officer thereof, duly authorized for that purpose, who may make any affidavit required of a creditor in the proceedings.

Id. § 7 (2 Edm. 37), am'd.

§ 2155. Id.; of partnership.

Where a partnership becomes a consenting creditor, the consent may be executed in its behalf, and any affidavit, required of a creditor in the proceedings, may be made, by either of the partners.

Id. § 8, am'd.

§ 2156. Effect of consent where petitioner is a joint debtor.

A creditor's consent does not affect his remedy against any person or persons indebted jointly with the petitioner; and the petitioner's discharge has the effect, as between the creditor and the other joint debtors, of a composition between the petitioner and the creditor, made as prescribed in article third of title fifth of chapter fifteenth of this act.

L. 1849, ch. 176 (4 Edm. 451), am'd. See §§ 1942 and 1944; also L. 1838, ch. 257, § 3.

§ 2157. Consent of purchaser of debt, etc.

Where a consenting creditor is the purchaser or assignee of a debt against the petitioner, or the executor, administrator, trustee, or receiver of such a purchaser or assignee, he is deemed, for all the purposes of this article, except as to the declaration and receipt of dividends, a creditor only to the amount, actually and in good faith paid for the debt, by him, or by the decedent or other person, from whom he derives title, and remaining uncollected. This section is not affected by the recovery of a judgment

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for the debt, after the purchase or assignment ; but in that case, the consenting creditor may include the uncollected costs, as if they were part of the sum paid for the debt.

2 R. S. 36, § 10, am'd.

§ 2158. Consenting creditor must relinquish security.

A creditor who has, in his own name, or in trust for him, a mortgage, judgment, or other security, for the payment of a sum of money, which is a lien upon, or otherwise affects, real or personal property belonging to the petitioner, or transferred by him since the lien was created, cannot become a consenting creditor, with respect to the debt so secured, unless he adds to or includes in his consent, a written declaration, under his hand, to the effect, that he relinquishes the mortgage, judgment, or other security, so far as it affects that property, to the trustee to be appointed pursuant to the petition, for the benefit of all the creditors. Such a declaration operates, to that extent, as an assignment to the trustee, of the mortgage, judgment, or other security ; and vests in him accordingly all the right and interest of the consenting creditor therein.

2 R. S. 36, § 11, am'd.

§ 2159. Penalty if creditor swears falsely.

If a creditor knowingly swears, in any proceedings authorized by this article, that the petitioner is, or will become, indebted to him, in a sum of money, which is not really due, or thereafter to become due ; or in more than the true amount ; or that more was paid for a debt, which was purchased or assigned, than the sum, actually and in good faith paid therefor ; he forfeits to the trustee, to be recovered in an action, twice the sum, so falsely sworn to.

Id. § 12, am'd.

§ 2160. Affidavit of consenting creditor.

The consent of a creditor must be accompanied with his affidavit, stating as follows :

1. That the petitioner is justly indebted to him, or will become indebted to him, at a future day specified therein, in a sum therein specified ; and if he, or the person from whom he derives title, is or was the purchaser or assignee of the debt, he must also specify the sum, actually and in good faith paid for the debt, as prescribed in § 2157 of this act.

2. The nature of the demand, and whether it arose upon written security, or otherwise, with the general ground or consideration of the indebtedness.

3. That neither he, nor any person to his use, has received from the petitioner, or from any other person, payment of a demand, or any part thereof, in money or in any other way, or any gift or reward of any kind, upon an express or implied trust, confidence, or understanding, that he should consent to the discharge of the petitioner.

Where a consenting creditor is an executor, administrator, trustee, receiver, or assignee, he may state the necessary facts in his affidavit, upon information and belief, setting forth therein the grounds of his belief ; but in that case, the consent must also be accompanied with the affidavit of the insolvent, to the effect, that all the matters of fact, stated in the affidavit of the consenting creditor are true.

2 R. S. 16, § 4 (2 Edm. 17), as modified by L. 1850, ch. 210, § 2 (2 Edm. 482), am'd.
See § 2157.

§ 2161. When non-resident creditor to annex account, etc.

A consenting creditor, residing without the State, and within the United States, must annex to his consent the original accounts, or sworn copies thereof, and the original specialties or other written securities, if any, upon which his demand arose or

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depends, provided, however, that when such original specialties, or other written securities, are lost, such fact must be stated as a reason for not annexing thereto the consent, and the fact of the loss, and the manner of the loss thereof, must be stated in the affidavit of the creditor to the best of his knowledge, or must be otherwise proved by affidavit to the satisfaction of the court; and the court may thereupon, in such case or proceeding, by its order, dispense with the annexing to such consent of the original specialties or other written securities.

Art. 7, § 9, R. S., am'd.

§ 2162. Petitioner's schedule.

The petitioner must annex to his petition a schedule, containing:

1. A full and true statement of all his creditors.
2. A statement of the place of residence of each creditor, if it is known; or, if it is not known, a statement of that fact.
3. A statement of the sum which he owes to each creditor, and the nature of each debt or demand, whether arising on written security, on account, or otherwise.
4. A statement of the true cause and consideration of his indebtedness to each creditor, and the place where the indebtedness accrued.
5. A statement of any existing judgment, mortgage, or collateral or other security for the payment of the debt.
6. A full and true inventory of all his property, in law or in equity, of the incumbrances existing thereon, and of all the books, vouchers, and securities, relating thereto,

Art. 3, § 5, R. S.

§ 2163. [Am'd, 1896.] His affidavit.

An affidavit, in the following form, subscribed and taken by the petitioner before the county judge, or in the city of New York, before the judge, holding the term of the court, at which the order specified in the next section is made, must be annexed to the schedule:

"I, ———, do swear" (or "affirm," as the case may be), "that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, in contemplation of my becoming insolvent, or within two years before presenting the petition herein, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property in order to defraud any of my creditors; that I have not, in any instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view fraudulently to obtain the prayer of my petition; that I have not done, suffered, or been privy to any act, matter, or thing which, if accomplished, would be ground for withholding my discharge under the provisions of this act, or invalidate such discharge if granted."

The omission by the petitioning creditor to comply with the provisions of the statute prescribing certain specific matters to be contained in the petition or added to it, was held not to be a defect depriving the officer of jurisdiction, but at most an irregularity to which objection should be made before the officer. *Russell Co. v. Armstrong*, 12 Abb. 472; *Matter of Edward Phillips*, 43 Barb. 108. Though it would be otherwise if, after rejecting

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the debt required by that provision to be released, being a secured debt, less than two-thirds in amount of the creditors, as shown in the petition, had united in the proceeding. *Morewood v. Hollister*, 2 Seld. 309. The affidavit cannot be sworn to before another officer authorized to administer oaths as a commissioner, and if so verified is void; it must be sworn to before the officer entertaining the proceeding and the defect cannot be corrected by making a new affidavit on the hearing. *Small v. Wheaton*, 2 Abb. 175. If not sworn to before the judge entertaining the proceeding or subscribed by him prior to granting the order for the creditors to show cause, it is a fatal defect, which renders the assignment and discharge void, and a subsequent verification of the petition will not cure the defect. *Ely v. Cooke*, 38 N. Y. 365. A petition which shows on its face that it is not signed by two-thirds of the creditors gives the officer no jurisdiction, and a discharge based on it is void. *Morrow v. Freeman*, 61 N. Y. 515, citing 7 Johns. 75, 3 Paige, 338, 28 Barb. 416, 12 N. Y. 575.

Precedent for Petition.

To the County Court of Ulster County :

The petition of Charles Ramsay, an insolvent debtor, respectfully shows :

First. That your petitioner resides at the town of Esopus, in the county of Ulster, and State of New York.

Second. That he is an insolvent debtor, and is unable to pay all his debts in full.

Third. That he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of article 1, of title 1, of chapter 17, of the Code of Civil Procedure, for the purpose of being discharged from his debts.

Wherefore your petitioner prays that upon his so doing he may be discharged accordingly.

Dated September 1, 1882.

CHARLES RAMSAY.

ULSTER COUNTY, ss. :

Charles Ramsay, of said county, being duly sworn, says that he is the petitioner in the annexed petition named; that he knows the contents thereof, and that said petition is in all respects true in matter of fact.

CHARLES RAMSAY.

Subscribed and sworn to before me, }
this 29th day of September, 1882. }

WM. LAWTON,
County Judge of Ulster County.

Petition for Discharge of Insolvent. (4 App. Div. 301.)

To the County Court of the County of Ulster :

The petition of Anthony W. Dimock, an insolvent debtor, respectfully shows :

1. That your petitioner resides in the town of Denning, in the county of Ulster and State of New York.
2. That he is an insolvent debtor, and is unable to pay all his debts in full.
3. That he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of article 1, of title 1, chapter 17, of the Code of Civil Procedure, for the purpose of being discharged from his debts.

Wherefore, your petitioner prays that upon his so doing he may be discharged accordingly.

Dated October 2, 1893.

ANTHONY W. DIMOCK.

(Add verification.)

It seems that an instrument by a creditor which "agrees to release" is not an absolute release but a conditional agreement to release, and is not in compliance with the statute. *Matter of Dimock*, 4 App. Div. 301.

It would seem that the conditions precedent to the petitioner's discharge which he must affirmatively establish are: first, that at the time of presenting his petition, he is a resident of the county where the proceeding is brought; second, that creditors having debts owing them in good faith, amounting to not less than two-thirds of all the debts owing to him by creditors in the county, shall at the time of filing of the petition consent to his discharge; third, that he is justly and truly indebted to the consenting creditors in a sum which amounts in the aggregate to two-thirds of all his debts. *Matter of Dimock*, 11 Misc. 611, 66 St. Rep. 352, 24 Civ. Pro. 313. See the same case upon appeal as to who are not *bona fide* creditors under the statute.

The petitioner had been a member of a corporation whose stock was of little or no value, and in order to create a demand for such stock, the petitioner asked two of the consenting creditors, who were officers with him of the same corporation, to buy and sell the stock on the market, agreeing to indemnify them against loss; *held*, that these confederates were not creditors of the petitioner as required by the statute. *Matter of Dimock*, 4 App. Div. 306.

Under 2 R. S. 16, providing for "voluntary assignments made pursuant to the application of an insolvent and his creditor, and

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from which statute the present provisions of the Code are the outcome, it was held that when the schedule annexed to the petition, presented by the insolvent, shows upon its face that the creditors joining in the petition do not own two-thirds of the debts owing by the insolvent," it is a jurisdictional defect and the discharge based upon the petition is void. *Morrow v. Freeman*, 61 N. Y. 517.

It was said that the fact that the petitioners are not creditors for two-thirds of the aggregate of the insolvent's debts is sufficient to prevent granting a discharge, though not ground for avoiding it after it has been granted. *Emberson's Case*, 16 Abb. 457; *Small v. Graves*, 7 Barb. 576; *Ayers v. Scribner*, 17 Wend. 407. But in *Morrow v. Freeman*, 61 N. Y. 515, it was determined that where this fact appeared on the face of the proceedings, the discharge was invalid. A creditor who has the body of his debtor in execution cannot be a petitioning creditor under the statute. *Beaty v. Beaty*, 2 Johns. Ch. 430. But the arrest and detention only amount to a satisfaction of the judgment for the time, and after the creditor is discharged from arrest, the creditor may petition as if no arrest had been made. *Fasset v. Talmage*, 15 Abb. 205. Under the Revised Statutes the affidavits must set forth the nature of the demands and the general ground and consideration of the indebtedness, or jurisdiction was not acquired under the provisions of the statute. *Merry v. Sweet*, 43 Barb. 476. Names without amounts attached to consents are of no avail. *Rusher v. Sherman*, 28 Barb. 416; *Stanton v. Ellis*, 12 N. Y. 575.

Consent of Creditors, to be Annexed to Petition.

We, the undersigned, creditors of Charles Ramsey, of the town of Esopus, in the county of Ulster, an insolvent debtor having debts due to us, in good faith, to the amount severally set opposite our names upon the accounts, notes, and securities, copies of which are hereto annexed, hereby consent to the discharge of the said Charles Ramsey from his debts, upon his complying with the provisions of article 1, of title 1, of chapter 17, of the Code of Civil Procedure. We hereby nominate Anthony Benson as trustee in this proceeding.

Dated Oct. 1, 1882.

Name of creditor.	Amount of debt owing.
W. F. Romer.	\$8,618 50
G. N. Van Duesen.	6,818 44
Eliza Wilson, as Executrix of A. P. Wilson, deceased.	12,469 50
Delia O'Neil.	2,982 23
(Add acknowledgment.)	

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Consent of Creditors to Discharge. (4 App. Div. 301.)

We, the undersigned creditors of Anthony W. Dimock, of the town of Denning, in the county of Ulster, an insolvent debtor, having debts due us in good faith to the amount severally set opposite our names upon the accounts, copies of which are hereto annexed, hereby consent to the discharge of the said Anthony W. Dimock from all his debts, upon his complying with the provisions of article 1, of title 1, of chapter 17, of the Code of Civil Procedure. We hereby nominate Henry M. Potter as trustee in this proceeding.

Dated, etc.

(Insert names of consenting creditors.)

Section 2153 is a re-enactment of the Laws of 1850, which changed the rule as it was held in *Matter of Sherryd*, 2 Paige, 602.

A petitioning creditor, who adds to his signature the declaration of release, thereby transfers to the assignee every and any lien or security upon the estate and property of the debtor, not a lien or security upon the property of a third person; when, therefore, such creditor has a joint judgment against two, the signing of the petition of one does not transfer to the assignee his claim against, or lien upon, the property of the other. *Ellsworth v. Caldwell*, 27 How. 188, affirmed, 48 N. Y. 680.

In connection with § 2156, see § 1942 of the Code of Civil Procedure, regulating the compounding of debts by joint debtors. Where one joint debtor compounds to his creditor, he only is released, and a member of a partnership cannot compound for the partnership debt, until the partnership has been dissolved by mutual consent or otherwise. See, also, § 1944, providing that a joint debtor who has not compounded his debt may compel his joint debtor who has compounded the debt, to contribute ratably as if he had not been discharged.

In *Slidell v. McCrea*, 1 Wend. 156, under the former statute, it was held that where the debtor procured a friendly creditor to purchase an outstanding indebtedness for less than its face, and the purchaser afterward joined in the petition for the debtor's discharge, placing the debt at its full value or amount, and without it two-thirds did not join, that the discharge was void. This rule was not applied where a purchaser had, some time previous to the application and without the knowledge of the debtor, obtained the claim and held it for its full amount. The mere purchase of a claim for less than its face and signing the petition for the full amount would not vitiate the discharge. Where the

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liability of an insolvent, as indorser upon unpaid promissory notes, has become fixed by protest and notice, the holders of protested paper may join in the petition, and the debts they represent are to be counted in determining whether or not the requisite amount is represented in the petition. This is because the discharge operates upon these obligations. *People v. Sutherland*, 81 N. Y. 1. One who has become a creditor of an insolvent, knowing him to be such, by buying a demand against him for less than its amount, cannot, by suing and recovering judgment for the whole amount, entitle himself to be considered a creditor to the actual amount paid for the debt or demand, and prosecuting the debt to judgment does not alter the case. *Emberson's Case*, 16 Abb. 457. Where the assignee of a demand petitions as a creditor, to the full amount, instead of to the amount which he paid for it, the discharge is not void, unless it is shown that the insolvent did not act in good faith. *Small v. Graves*, 7 Barb. 576.

While, under the provisions for insolvent's discharge, a creditor holding security cannot become a consenting creditor under the act, with respect to the debt so secured, unless he adds to or includes in his consent a written declaration under his hand to the effect that he relinquishes the security, so far as it affects that property; yet, in equity, a secured creditor of an insolvent may prove his entire claim regardless of the security received and dividend thereon. The court stated that the rules in bankruptcy cases proceed from the provisions of the statute and they are not controlling upon a court administering in equity, and upon the estates of insolvent debtors. *People v. Remington & Sons*, 25 Abb. N. C. 80. Compare *Matter of Ives*, 25 Abb. N. C. 66.

Where such creditors have security for any part of the debts due them, and neglect to sign the declaration required by the statute, they will not be regarded by the statute as petitioners with regard to the debts so secured, and when, after rejecting such debts, less than two-thirds in amount of the creditors of the insolvent, as shown by the petition, have joined in signing and presenting it, the officer to whom it is presented obtains no jurisdiction to grant a discharge. *Morewood v. Hollister*, 2 Seld. 309.

But in case two-thirds in amount of the creditors, exclusive of

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such debts, have joined in the proceeding, it seems such omission would be only an irregularity which would be waived, unless objection is made on the hearing. *Russell Manuf. Co. v. Armstrong*, 12 Abb. 472. It is said, in *Soule v. Chase*, 1 Robertson, 222, that the omission of a petitioning creditor to relinquish a security does not affect the jurisdiction or avoid the discharge; the omission of a petitioning creditor to state that he relinquished a judgment held by way of security is not a jurisdictional defect; it is a mere irregularity that may be cured by amendment. *Ex parte Phillips*, 43 Barb. 108; *Russell Manuf. Co. v. Armstrong*, 12 Abb. 472. An indorsement on the petition by a judgment creditor, stating that he "releases to the assignee to be appointed, all claims on the estate of the debtor, that I may have by reason of the judgment against him assigned to me," is sufficient. *Augsbury v. Crossman*, 10 Hun, 389. A petitioning creditor whose debt is secured must annex a declaration relinquishing such securities for the benefit of all the creditors. *Morewood v. Hollister*, 6 N. Y. 309. It is only claims against the insolvent which must be released; it does not affect a joint judgment as to a third party. *Elsworth v. Caldwell*, 48 N. Y. 680. When a creditor has his debtor imprisoned on execution, he cannot be a petitioning creditor, since the imprisonment, so long as it continues, is a satisfaction. *Beaty v. Beaty*, 2 Johns. Ch. 430; *Koenig v. Steckel*, 58 N. Y. 475.

Consent of Secured Creditor.

The undersigned creditors of Charles Ramsey of Esopus, in the county of Ulster, an insolvent debtor, having debts owing to us in good faith to the amounts severally set opposite our names, upon the securities hereinafter described, hereby consent to the discharge of the said Charles Ramsey from his debts, upon his complying with the provisions of Article 1 of the title 1 of chapter 17 of the Code of Civil Procedure. And whereas the undersigned have and hold certain mortgages which are a lien upon the real estate belonging to the said Charles Ramsey, namely:

The Ulster County Savings Institution, mortgage dated July 24, 1880, to secure the sum of \$3,530.43, upon premises described therein as follows (here describe premises):

The Rondout Savings Bank, a mortgage dated September 30, 1880, for \$2,696.97, upon the premises therein described as follows (insert description), which said mortgages are held to secure the payment of the aforesaid sums. Now, pursuant to statute, we, the undersigned, do hereby relinquish the said mortgages to the trustee to be appointed

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pursuant to the petition of said Charles Ramsey, for the benefit of all his creditors, and do hereby nominate Anthony Benson as such trustee.

THE ULSTER COUNTY SAVINGS INSTITUTION,
[L. S.]

By A. H. BRUYN,
President.

THE RONDOUT SAVINGS BANK,
By THOMAS CORNELL,

President.

(Add acknowledgment.)

The affidavit of the consenting creditor must also state that neither he nor any person to his use, received from the petitioner or from any other person payment of a demand or any gift or reward on the understanding that he consent to the discharge of the petition; and it has been held where the petitioner promised that, if he obtained his discharge, he would devote five years of his life to the benefit of his consenting creditors, that while the court would not hold that such promise was a valuable gift, yet it seemed to be tampering with the good faith which the statute requires, and it seems that consents thus required will not be allowed. *Matter of Dimock*, 4 App. Div. 309.

The Code requires the consent of the consenting creditors to be accompanied with his affidavit, stating the nature of the demand and the general ground or consideration of the indebtedness. *In the Matter of Dimock*, 4 App. Div. 307, the court, it seems, gives as one, among other reasons, for dismissing the petition of an insolvent, that the facts of the case left it open to question whether the real nature of the consenting creditor's demand with the general ground of the indebtedness, was not suppressed.

A petitioning creditor's affidavit, that the sum annexed to his name is justly due to him from the insolvent for two promissory notes specified, does not state the nature of his demand "with the general ground and consideration of the indebtedness;" and if the claim so stated is necessary to make up the requisite two-thirds, the judge does not gain jurisdiction. *Gillies v. Crawford*, 2 Hilt. 338; *Merry v. Sweet*, 43 Barb. 475. Stating that the sum is justly due to him from the insolvent for goods, wares, and merchandise, sold and delivered, secured by indorsement of a note specified, held good. *Pratt v. Chase*, 29 How. 296. See *Matter of Cook*, 15 Johns. 183. If the petition fails to state grounds of indebtedness, and the defect is amended upon ob-

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jection taken before the judge, the discharge will be valid. *Matter of Hurst*, 7 Wend. 239; *Small v. Wheaton*, 2 Abb. 275. If he fails to amend at the hearing and his application is denied for that reason, he may afterward move for a rehearing and for leave to amend, but he must first procure the order denying his application to be set aside, that order being properly the end of the proceeding. *Matter of Rosenberg*, 10 Abb. (N. S.) 450. Where the affidavits of the petitioning creditors were made in another State, sworn to before a commissioner residing in another State, a certificate of the secretary of State of that State is not necessary to confer jurisdiction. *Rusher v. Sherman*, 28 Barb. 416.

Precedent by Affidavit for Creditor.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

Eliza Wilson, of said county, being duly sworn, says that she is the executrix of Aaron P. Wilson, deceased, and as such executrix is one of the creditors named in the accompanying consent to the discharge of Charles Ramsey, an insolvent debtor. That deponent is a resident of Union Avenue in the city of Kingston, Ulster County, N. Y. That said Charles Ramsey is justly indebted to this deponent as such executrix in the sum of \$12,469.56. The said indebtedness arose upon the following facts: The said Ramsey borrowed of said estate the sum of \$12,000, and to secure such sum gave his note to said estate of date of October 15, 1879, for \$12,000. That said estate is now the owner and holder of said note; that deponent, as such executrix, has not, nor has said estate, any other security, written or otherwise, for the payment of said debt. That deponent has not, nor has any person to her use, or to the use of said estate, received from the said Ramsey, or from any other person, payment of said demand, or any part thereof, in money or in any other way, or any gift or reward of any kind upon an express or implied trust, confidence or understanding that she should consent to the discharge of the said Ramsey. The said deponent makes this affidavit of her personal knowledge. And that letters testamentary were duly issued to this deponent on the estate of Aaron P. Wilson, deceased, out of the surrogate's court of Ulster County on the 12th day of May, 1880. That on the 1st day of September, 1882, an order was duly made and entered in said court, authorizing this deponent to become a consenting creditor in this matter, pursuant to the provisions of § 2153 of the Code of Civil Procedure.

(Jurat.)

(Signature.)

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Verified Statement of Debt by Creditor. (4 App. Div. 301.)

ANTHONY W. DIMOCK, DR.,

To the Home Insurance Company, To judgment recorded in the Supreme Court of the State of New York against Anthony W. Dimock, and entered January 30, 1890.....	\$124,239.95
To interest at 6 per cent. to May 1, 1893.....	23,247.49
	<u>\$148,487.44</u>

STATE OF NEW YORK }
CITY AND COUNTY OF NEW YORK, } ss.:

William L. Bigelow being duly sworn says that he is the secretary of the Home Insurance Company, one of the creditors named in the accompanying consent to the discharge of Anthony W. Dimock, an insolvent debtor. That said Home Insurance Company is a domestic corporation organized under the laws of the State of New York.

That the said Anthony W. Dimock is justly indebted to said Home Insurance Company in the sum of \$148,487.44. That said indebtedness arose as follows: (insert statement of facts).

That on or about May 15th, 1884, payment of said loans was demanded, and subsequently the said company realized as much as possible upon the securities; that the judgment recovered is for the unpaid balance of the indebtedness, viz., \$124,239.95.

That said Company has not, nor has any person for its use, received from the said Dimock or from any other person, payment of the said judgment or of any part thereof in money or in any other way or any gift or reward of any kind upon an express or implied trust, confidence, or understanding that it should consent to the discharge of the said Dimock. That said Company has no security, written or otherwise, for the payment of said debt.

(*Verification and signature.*)

The omission of petitioning creditors, who reside in other States, to annex the original accounts or sworn copies, and the original specialties or securities, if any, on which their demands arise, is fatal to the proceedings, and the defect cannot be supplied on the hearing. *Warrin's Case*, 16 Abb. 457, n.

The interest of an insolvent debtor in a patent right under an assignment which obliges him to prosecute claims for infringement at his own expense, is only that of a trustee and cannot be sold as an asset of his estate. Though this section under subdivision 1 requires a full and true statement of all the petitioner's creditors, yet where, in the list of creditors annexed to the petition, there appeared the name of a creditor recently deceased, of whose estate an administrator had been appointed, it was held that such error did not make the proceedings void, as the administrator's appointment did not appear to have been known to the petitioner.

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Wheeler v. Emmeluth, 12 Supp. 58, reversed on other grounds, 121 N. Y. 243, 30 St. Rep. 919.

The jurisdiction of the court under the Code providing for an insolvent's discharge is special, and the statutory requirements must be strictly followed. Thus, where the schedule filed with the petition, though giving name of the creditor together with a street and house number, gave no name of the town where such street was located and in which the creditor resided, the schedule was held to be fatally defective and the court without jurisdiction to grant a discharge or to permit an amendment of the schedule. *Matter of Cohen*, 9 Supp. 498, 18 Civ. Pro. 157, 16 Daly 70.

It is also a fatal defect for the debtor to omit the name of a creditor in his schedule, and he is not excused therefrom because he omitted it under advice of counsel that he had a good defence to the claim, and such admission is not cured by a subsequent insertion of the name where it was omitted under circumstances which indicated fraud. *Starr v. Patterson*, 27 Abb. N. C. 19; compare *Bullymore v. Cooper*, 46 N. Y. 236.

The petition and schedule need not state the grounds of creditor's demands with the particularity required for a confession of judgment. *Soule v. Chase*, 1 Robt. 222. When it appears, from the papers presented, that the true cause and consideration of the alleged indebtedness of an insolvent debtor to a creditor are not set forth in the schedule, this is a matter proper for the consideration and determination of the officer before whom the matter is heard, and except as to those matters which the statute holds sufficient to bar a discharge, the creditors having notice, and failing to appear and make objection, will be concluded in case the officer has jurisdiction. *People v. Striker*, 24 Barb. 649. The statement as to the cause of a debt that it is "on account" on a judgment "on a promissory note" is insufficient. *Merry v. Sweet*, 43 Barb. 475. It will not invalidate a discharge where there is a simple misstatement of amount due any creditor, nor where the name of the creditor is omitted from the schedule; to have that effect, it must appear that the omissions were fraudulent. *American Flask Co. v. Son*, 7 Robt. 233; *Small v. Graves*, 7 Barb. 576; *Soule v. Chase*, 1 Abb. (N. S.) 48; *Matter of Hurst*, 7 Wend. 239; *Ayres v. Scribner*, 17 id. 407. And where a debtor was discharged under the laws of another State relating to insolvency, he was relieved from liability for the debt, although his name was omitted from the

 Art. 2. The Petition and Accompanying Papers.

schedule in the proceedings, and he had no notice of the proceedings, the omission having been by mistake or inadvertence and not fraudulent or wilful. *Hall v. Robbins*, 4 Lans. 463. The debtor's schedule must not, however, be defective in respect to matters necessary to confer jurisdiction on the officer. The amount due each creditor named cannot be omitted, nor can a blank be left opposite the name of one of the creditors named, and no sum given. These defects are jurisdictional, and render the discharge void, notwithstanding the recital that two-thirds in amount of the creditors united in the petition, and that it satisfactorily appeared to the officer that the insolvent had in all respects complied with the statute. *Stanton v. Ellis*, 2 Kern. 575. The nature of the debt, and the true cause and consideration of it, must appear. *Slidell v. McRea*, 1 Wend. 156; *Matter of Cook*, 15 Johns. 83; *McVair v. Gilbert*, 3 Wend. 344; *Stanton v. Ellis*, 12 N. Y. 575. This is held when the question arises collaterally. But see *Merry v. Sweet*, 43 Barb. 476; *Schaeffer v. Soule*, 23 Hun, 583. The schedule may be amended on the return day. *Matter of Hurst*, 7 Wend. 239; *Brodie v. Stephens*, 2 Johns. 289; *Matter of Rosenberg*, 10 Abb. (N. S.) 450; *Morewood v. Hollister*, 2 Seld. 311. The trust resulting to a debtor in respect to any surplus that may remain after payment of debts under an order appointing a receiver of his property, or under a general assignment for the benefit of creditors, is an interest which he must disclose and assign in proceedings to obtain a discharge from his debts. *Billings' Case*, 21 How. 448; *Bulymore v. Cooper*, 46 N. Y. 236. If the schedule annexed to the petition state the consideration of the plaintiff's debt as "notes and open accounts for money loaned and interest thereon," it is sufficient to support the jurisdiction. *Schaeffer v. Soule*, 23 Hun, 583. Where an action is brought upon an application which was obtained by false representations, the fraud is no part of the consideration of the debt, and it is not, therefore, necessary to set it forth in a petition for a discharge in order to give jurisdiction, and the debtor, having been discharged in the insolvency proceedings, is entitled to have the judgment in the action marked satisfied, and he is no longer liable to arrest. *Schaeffer v. Soule*, 23 Hun, 583. On the return day the schedules may be amended. *Brodie v. Stephens*, 2 Johns. 289; *Matter of Hurst*, 7 Wend. 239; *Matter of Rosenberg*, 10 Abb. (N. S.) 450.

Art. 2. The Petition and Accompanying Papers.

SCHEDULE OF CREDITORS OF CHARLES RAMSEY, PURSUANT TO § 2162 OF THE CODE OF CIVIL PROCEDURE.
A full and true account of all the creditors of Charles Ramsey, an insolvent debtor, with the place of residence of each, the sum owing to each of them by the said insolvent, and the nature of each debt or demand, with the true cause and consideration thereof, and the place where the same accrued and the existing judgments, mortgages, or collateral security, or other security for the payment of the same. Dated Sept. 1, 1882.

CREDITORS.	Residence.	Amount.	Nature of debt or demand, whether arising on written security on account or otherwise, and true cause and consideration thereof.	Accrued at	Statement of any existing judgments, mortgage, or collateral, or other security for its payment.
William F. Romer.....	Kingston City, Ulster Co., N. Y.	\$8,618 50	Indebtedness arose for notes indorsed by Romer for said Ramsey, and subsequently paid by said Romer, excepting one note of \$2,000, which was for money loaned to Ramsey by Romer & Tremper, afterward paid by Romer, and which secured notes now belonging to Romer, and are mentioned in this schedule.	Kingston, Ulster Co., N. Y.	This indebtedness is evidenced by notes of said Ramsey, one dated October 16, 1878, indorsed by Romer & Tremper, for \$2,000. Note dated April 13, 1880, to order of said Romer for \$1,500. Like note due May 3, 1880, for \$3,000. Like note due May 17, 1880, for \$2,800 less some payments.
Geo. N. Van Deusen.....	Kingston City, Ulster Co., N. Y.	\$6,807 44	Indebtedness arose from notes indorsed by said Van Deusen, and subsequently paid by him, notes of Ramsey and for him to pay. Notes now belong to Van Deusen, and are mentioned in this schedule; one payment has been made on debt.	Kingston, Ulster Co., N. Y.	This indebtedness is evidenced by notes of said Ramsey, one for \$4,000 and interest from Feb. 3, 1880; one for \$1,200 due April 16, 1880; one for \$2,800, due May 17, 1880; one for \$1,200, due June 6, 1880. On these notes the said Van Deusen was surety of first indorser. He held as collateral 15 shares of stock of Nat. Bank of Rondout, value of \$1,800, which has been credited.
Treadwell, Slote & Co.	New York City.	\$3,127 80	Indebtedness arose for goods, wares, and merchandise sold and delivered during six years last passed, and on account of indebtedness of a firm of which Charles Ramsey was formerly a member and which he agreed to pay.	New York City.	This indebtedness is secured by a collateral mortgage on property of Ramsey; situated in the city of Brooklyn, and partially by indorsed notes.

(Add inventory of property under heading as in subdivision 6 of section.) (Add debtor's affidavit, § 2163.)

Art. 2. The Petition and Accompanying Papers.

An affidavit made before a commissioner of deeds is insufficient, and the proceedings held invalid for that reason; it was required, under the statute allowing the proceeding to be taken before a judge, that the affidavit must be sworn to before the officer to whom the petition was presented, in order to give jurisdiction to grant the discharge. *Small v. Wheaton*, 2 Abb. 175; *Ely v. Cook*, 2 Hilt. 406, affirmed, 28 N. Y. 365. And the same cases hold it does not remedy the defect, notwithstanding on the day on which the order to show cause is returnable, the officer signed the *jurat* to the affidavit, nor by permitting the insolvent to make an additional affidavit before the officer. Where the insolvent's affidavit, instead of stating that he had not disposed of or made over any part of his estate for the future benefit of himself or his family, stated that he had not disposed of or made over any part of his estate for the future benefit of himself *and* his family, it was held that the discharge granted upon it was void. *Hale v. Sweet*, 43 Barb. 475, affirmed, 40 N. Y. 97. A judgment confessed, with a view to petitioning, followed by a levy and sale, amounts to an assignment, and though done in trust for all creditors equally, it is a fraud on the act and vitiates the discharge. *Matter of Hurst*, 7 Wend. 239.

Section 2163 requires, among other things, in the petitioner's affidavit, "I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view fraudulently to obtain the prayer of my petition." In construing this provision, the Court said that a promise by the petitioner to devote five years of his life to the benefit of the consenting creditors would seem to indicate bad faith, and that consents by creditors thereby obtained should not be allowed. *Matter of Dimock*, 4 App. Div. 309. In proceedings under what was known as "The Two-Thirds Act," Art. III., title 1, chap. 5, part 2 of the Revised Statutes, which required the insolvent debtor, among other things, to state: "I have not at any time or in any manner whatever disposed of or made over any part of my estate, for the future benefit of myself *or* my family," which is practically the wording in this section of the Code; it was held that where the petitioner used the words "myself *and* family," instead of the word "or" as required by statute, that the affidavit was deficient and the discharge granted thereon was void, and that judgments previously recovered against the debtor remained in full

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force. *Hale v. Sweet*, 40 N. Y. 100; compare *Bullymore v. Cooper*, 46 N. Y. 236, a case arising under the act providing for a discharge of the debtor imprisoned on execution, Art. VI., title 1, chap. 5, part 2, Revised Statutes. In this case the statute required that at the time of the presenting of the petition, an affidavit in a prescribed form should be indorsed upon the petition and should be sworn to by the applicant. It was held in the case where the affidavit was not indorsed upon the petition at the time of presenting it, that the omission defeated the jurisdiction of the court, and that the section requiring the petition, and the section requiring the affidavit, must be considered good, and that both were prerequisites to jurisdiction.

ARTICLE III.

ORDER TO SHOW CAUSE AND PROCEEDINGS THEREON.

§§ 2164 to 2172.

§ 2164. Order to show cause.

The petition and other papers, specified in the foregoing sections of this article, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why an assignment of the insolvent's property should not be made, and he be thereupon discharged from his debts, as prescribed in this article; and directing that the order be published and served, as prescribed in the next section.

§ 2165. How order published and served.

The order must be published and served in the following manner:

1. The petitioner must cause a copy thereof to be published in a newspaper, designated in the order, published in the county; and also if one-fourth part of the insolvent's debts accrued or are due to creditors residing in the city of New York, in a newspaper published in that city, designated in the order. The publication must be made at least once in each of ten weeks, immediately preceding the day in which cause is to be shown, unless all the creditors reside within one hundred miles of the place where cause is to be shown, in which case the publication must be made at least once in each of the six weeks, immediately preceding that day.

2. The petitioner must also serve upon each creditor, residing within the United States, whose place of residence is known to him, a copy of the order to show cause, either personally, at least twenty days before the day when cause is to be shown, or by depositing it, at least forty days before that day, in the postoffice, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

Where the State is a creditor of the petitioner, a copy of the order must be served upon the attorney-general, who must represent the State in the subsequent proceedings.

Art. 3, §§ 10 and 11, R. S., and L. 1847, ch. 366, § 1 (4 Edm. 481), am'd.

 Art. 3. Order to Show Cause and Proceedings thereon.

§ 2166. Hearing.

On the day specified in the order, and before any other proceedings are taken in the matter, the petitioner must present to the court, and file with the clerk, proof, to the satisfaction of the court, that the order has been published and served, as prescribed in the last section; and thereupon, on the same day, or upon the day to which the hearing is adjourned, the court must hear the allegations and proofs of the parties appearing. Proof of personal service of a copy of the order upon any person must be made, in like manner as proof of personal service of a summons, in an action brought in the Supreme Court.

Id. § 12, and L. 1847, ch. 366, § 2 (4 Edm. 481), am'd. See § 434.

§ 2167. Putting cause on calendar.

Where the insolvent's discharge is opposed, the court may direct the special proceeding to be placed upon the calendar for trial. In that case, the parties must appear, and the proceedings are the same, as in an action, except as otherwise prescribed in this article; and costs, as in an action, except for proceedings before notice of trial, may be awarded to either party, in the discretion of the court.

§ 2168. Opposing creditor to file specifications, and may demand jury trial.

In order to entitle a creditor to oppose the discharge of the insolvent, he must, on the day fixed, show cause, or at such other time as the court directs, file with the clerk a specification of his objections; and he may then, but not afterwards, demand a trial, by a jury, of the questions of fact arising thereupon. If a trial by a jury is not then demanded, the questions of fact must be tried by the court, without a jury. Where one or two or more opposing creditors demands a trial by a jury, all the material questions of fact, arising upon the objections of all the creditors, must be tried in like manner, and at the same time. The court may, in its discretion, direct the questions to be settled, and plainly stated, in an order, as where an order is made by the Supreme Court, in an action pending therein, for the trial of questions of fact by a jury.

Section 13, R. S., am'd. See §§ 1163 and 1190.

§ 2169. Id.; to file proofs, if not named in schedule.

Where the name of an opposing creditor does not appear in the schedule, he must file, with the specification of his objections, proof by affidavit, that he is a creditor; and if his debt is not set forth in the schedule, he must also file his affidavit, to the effect specified in subdivisions first and second of § 2160 of this act.

§ 2170. Proceedings if jurors do not agree.

There shall be but one trial by jury. If the jurors cannot agree, after being kept together for such a time as the court deems reasonable, the court must discharge them, and determine the questions of fact, or those questions as to which the jurors have not agreed, upon the evidence taken before the jury, as if a jury had not been demanded.

Id., § 19.

§ 2171. When insolvent required to produce his non-resident wife.

Where the petitioner's wife resides without the State, the court, or a judge thereof out of court, may, upon the application of any creditor, make an order, requiring the petitioner to bring his wife before the court, at the hearing or trial, to the end that she may be examined as a witness. A copy of the order must be personally served upon the petitioner, at least three weeks before the hearing. If it appears, upon the hearing, that service could not, with due diligence, be so made, in consequence of the peti-

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tioner's sickness or absence, the court may, in its discretion, adjourn the hearing or trial, and prescribe the time and manner of service of the order for the adjourned day. If, after due service, the petitioner's wife does not attend at the time and place appointed, the petitioner is not entitled to his discharge, unless he proves, to the satisfaction of the court, by his affidavit, or upon his oral examination, or otherwise, that he was unable to procure her attendance.

Id. §§ 20 and 21, am'd and consolidated.

§ 2172. Examination of insolvent.

At the hearing or trial, the petitioner must be examined under oath, at the instance of any creditor, touching his property or debts, or any other matter stated in his schedule, or any changes that have occurred in the situation of his property, since the making of the schedule; and particularly whether he has collected any debts or demands, or made any transfers of, or otherwise affected, his real or personal property. Any creditor may contradict or impeach, by other competent evidence, the testimony of the insolvent or of his wife.

A notice stating that the proceeding is for the discharge of an insolvent need not specify the particular statute, and a defective reference to the statute does not vitiate the order. *Soule v. Chase*, 1 Abb. (N. S.) 48; but see 39 N. Y. 342.

Precedent for Order to Show Cause.

At a term of the County Court of Ulster County, held at the chambers of the county judge of said county, on the 29th day of September, 1882:

Present:—Hon. William Lawton, *County Judge*.

In the Matter of the Application of Charles Ramsey, an Insolvent Debtor, for his discharge from his debts.
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On reading and filing the petition of Charles Ramsey, an insolvent debtor, verified on this 29th day of September, 1882, the consents and affidavits of the following creditors of said Ramsey, viz.: William E. Romer, George N. Van Deusen, Eliza Wilson, executrix of A. P. Wilson, deceased, W. B. Crane, Turck & Burhans, the affidavit of Charles Ramsey, verified September 8, 1882, the order of the surrogate of Ulster County, granted September 25, 1882, authorizing the executrix of A. P. Wilson, deceased, to sign consent, and the affidavit of Charles Ramsey, verified the 29th day of September, 1882, with the accompanying schedules, and on motion of A. W. Cooper, attorney for said petitioner, it is

Ordered, that all the creditors of the said Charles Ramsey show cause before this court, at a term thereof to be held at the chambers of the county judge of Ulster County, in the city of Kingston, said county, on the 20th day of December, 1882, at two o'clock in the afternoon of that day, why an assignment of said insolvent's property should not be made, and he be thereupon discharged from his debts,

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as prescribed in Article I., of title 1, of chapter 17, of the Code of Civil Procedure.

That a copy of this order be published in the Albany Evening Journal, the newspaper printed at Albany (see statute as to State paper enacted since Code), in which legal notices are required by law to be published, and in the Leader, a newspaper published in the county of Ulster, at least once in each of the ten weeks immediately preceding the said 20th day of December, 1882.

That the petitioner also cause to be served upon each creditor of the said Charles Ramsey, residing within the United States, whose place of residence is known to him, a copy of this order, either personally or at least twenty days before the said 20th day of December, 1882, or by depositing it at least forty days before that day in the postoffice, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

WM. LAWTON,

County Judge of Ulster County.

Order to Show Cause. (4 App. Div. 301.)

At a Special Term of the County Court held at the Ulster County court-house in the city of Kingston, October 2d, 1893 :

Present :—Hon. A. T. Clearwater, *County Judge*.

In the Matter of the Application of Anthony W. Dimock, an Insolvent, etc.
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On reading and filing the petition of Anthony W. Dimock, an insolvent debtor, verified on the 21st day of October, 1893, and consents and affidavits of the following creditors of said Anthony W. Dimock (insert names); and the affidavit of Anthony W. Dimock, with the accompanying schedules verified August 7th, 1893, and on motion of B. C. Chetwood, Esq., attorney for said petitioner, it is

Ordered, that all the creditors of the said Anthony W. Dimock show cause before this court at a term thereof to be held at the county judge's chambers in the city of Kingston on the 15th day of November, 1893, at 11 o'clock in the forenoon of that day, why an assignment of the said insolvent's property should not be made and he be thereupon discharged from his debts as prescribed in Article I., of title 1, of chapter 17 of the Code of Civil Procedure. And it is further

Ordered, that a copy of this order be published in the ——— and in the ———, newspapers published in city of Kingston, county of Ulster, and in the New York Law Journal, a newspaper published in the city of New York, at least once in each of the six weeks immediately preceding the said 15th day of November, 1893. And it is further

Ordered, that the petitioner cause to be served upon each creditor of the said Anthony W. Dimock residing within the United States, whose place of residence is known to him, a copy of this order either personally at least 20 days before the said 15th day of November,

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1893, or by depositing it at least 40 days before that day in the post-office enclosed in a postpaid wrapper addressed to the creditor at his place of residence.

A. T. CLEARWATER,

County Judge of Ulster County.

A true copy, original filed Oct. 31, 1893.

JAMES W. WURTS,
Clerk.

It will be noticed that the order itself must now be published and served, and not a notice of its contents, as formerly. Due publication and service was held necessary to give the officer jurisdiction and to authorize him to grant a discharge so as to bar creditors. *Stanton v. Ellis*, 16 Barb. 319; *Matter of Underwood*, 3 Cow. 59; *People ex rel. Demarest v. Gray*, 19 How. 238; *People v. Daly*, 4 Hun. 641. It is doubtful whether the question can be raised, however, except upon a direct proceeding to review, either by *certiorari* or appeal. *Rusher v. Sherman*, 28 Barb. 416. In computing the time for the publication and service of the notice, the rule is held in like cases to be to exclude the first day and include the last. *Westgate v. Handlin*, 7 How. 372; *Dayton v. McIntyre*, 5 id. 117; *Bunce v. Reed*, 16 Barb. 347; *Steinle v. Bell*, 12 Abb. (N. S.) 171. As to what was held sufficient service by mail, see *Hornby v. Cramer*, 12 How. 490; *Bunce v. Reed*, 16 Barb. 347; *Steinle v. Bell*, 12 Abb. (N. S.) 171. If notice is directed to be published six weeks, first publication must be at least forty-two days before day appointed; if ten weeks, at least seventy days before such day and publication must be made in every intervening week until the expiration of the time. *Anonymous*, 1 Wend. 90; *People v. Grey*, 19 How. 238. The officer has no jurisdiction, if, in any of the ten weeks, there was no publication, and an order for an assignment made in such case is a nullity. *Dickerhoff v. Ahlborn*, 2 Abb. N. C. 372. The discharge is void if the only proof of notice for creditors to appear was of a notice purporting to be returnable at a date subsequent to that on which the discharge was granted. *Lewis v. Page*, 8 Abb. (N. S.) 200. Until publication of a notice of application of a debtor to be discharged from imprisonment is made, the officer is without jurisdiction. *People v. Daly*, 4 Hun, 641. This case more fully, 67 Barb. 325, holding that a mistake in the designation of the return day in the notice, as published in one of the papers, is fatal to jurisdiction, there being no appearance. Where the insolvent is ignorant of, and cannot ascer-

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tain, the street number or exact address of one or more of all the creditors, it is a sufficient compliance with the statute to mail the notice addressed to the city or town where creditor or creditors to be served reside. *People v. Sutherland*, 81 N. Y. 1. A mistake in the spelling of the name of a creditor to whom notice is addressed, the error being the substitution of one letter merely for another without effect upon the sound, and in case where there was a description of the person, does not affect the proceeding. *People v. Sutherland*, 81 N. Y. 1.

As to the omission of the full addresses of the creditors in the petition in order that the court may correctly determine the period for which publication shall continue, see *Matter of Cohen*, 18 Civ. Proc. 158, 16 Daly 70, 9 Supp. 499. It seems that the question as to whether a judgment creditor was served with the order pursuant to subdivision 2, § 2165, Code Civ. Proc., cannot be determined upon affidavits. *Robens v. Sweet*, 48 Hun, 438, 1 Supp. 840. This case was an appeal from an order denying a motion to set aside supplementary proceedings, the judgment debtor claiming a discharge from his debts as provided by this article of the Code. The provisions of the Code as to service, etc., must be strictly complied with; thus, as subdivision 2 of this section requires the order to show cause to be served either personally or addressed to the creditor at his usual place of residence, it was held that where the order was addressed to the creditor at his place of business, instead of at his residence, that the service was not good and that the court did not require jurisdiction to grant the discharge. *Billinge v. Pickert*, 39 Hun, 505, 1 St. Rep. 70. This case also decided that the court would refuse to receive parol evidence of personal service, where the record itself did not show it.

Where an order cancelling and discharging two judgments was granted without notice to the owner of the judgments, and without proof of his consent, such order may be vacated on simply showing want of notice. *Wheeler v. Emmcluth*, 121 N. Y. 243, 30 St. Rep. 919. A discharge under "the Two-third Act" cannot be granted without proof of the service of notice of the proceedings upon each of the creditors, and the judge reviewing the proceeding is only authorized to receive legal evidence of such service, although the act requires proof of such fact to be "satisfactory"; therefore an affidavit of service, which, although signed, contained

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no name of deponent in the body thereof, was held to be defective. *People ex rel. Kenyon v. Sutherland*, 16 Hun, 194. Where the petitioner merely promised to indemnify fellow-officers in a corporation from loss for buying and selling stock of the corporation on the market, in order to create a demand for the same, it was held in effect, that the petitioner was not "justly and truly indebted" to them as is required by § 2174 of the Code Civ. Proc. before the court can direct an assignment. *Matter of Dimmock*, 4 App. Div. 305. Where a deed executed in insolvent proceedings was objected to in an action for ejectment, without previous proof of the insolvent proceedings upon which it was based, it was held that the deed established a *prima facie* title, and that the insolvent proceedings only needed to be shown in order to give effect to the deed given by persons in whom the title is not vested and who derive their power to convey from the statute, and the proceedings under which they acted. *Rockwell v. Brown*, 54 N. Y. 213. Not so, however, where the insolvent proceedings are void. *Rockwell v. McGovern*, 69 N. Y. 299, distinguishing *Rockwell v. Brown*, *supra*. The officer is not bound to wait for parties beyond the arrival of the precise time appointed, though he may do so in his discretion. The proceedings, however, should be vacated if any trick or artifice is practised by which parties are prevented from appearing at the precise time appointed. *Ex parte Hagaman*, 2 Hill, 415; *Matter of Pulver*, 6 Wend. 632; *Matter of Bradstreet*, 13 Johns. 385. Due legal proof of publication and service of notice is necessary in order to give the officer jurisdiction, and without such proof he has no authority to grant the discharge or any of the necessary orders prior thereto; an affidavit sworn to before an officer having no power to take it is insufficient. *Stanton v. Ellis*, 16 Barb. 319; *Lewis v. Page*, 8 Abb. (N. S.) 200. *Contra*, *Soule v. Chase*, 1 id. 48, reversed, 39 N. Y. 342. Although if the officer, without such proof, assumes to act and grants a discharge, it has been held binding, except in a direct proceeding to review the decision. *Rusher v. Sherman*, 28 Barb. 406; *Stanton v. Ellis*, 12 N. Y. 575. In *Soule v. Chase*, *supra*, it is held that proof of publication is not limited to the affidavit of the parties or his clerk. But see 39 Hun, 504, *supra*. The creditors may appear at the time appointed in the order and contest the right of the insolvent to a discharge, but if, after having been properly

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served, they neglect to appear and object, they will be concluded by the proceedings in case the officer has jurisdiction, except as to matters declared fatal by statute. *People v. Stryker*, 24 Barb. 649; *Matter of Bradstreet*, 13 Johns. 385. But it is only creditors who are recognized as such by the insolvent in his schedules who may appear and contest. All others, when they come in to oppose the discharge, must first prove their claims as subsisting ones, otherwise they are not authorized to appear and oppose. *Avery's Case*, 6 Abb. 144.

By "proof satisfactory to the officer" before whom the proceedings are had, is meant such evidence as is necessary to convince him judicially, and not arbitrarily or capriciously. He is not to be satisfied by proof legally insufficient, neither can he withhold his satisfaction when proof, which the law deems adequate, is presented to him. *People v. Sutherland*, 81 N. Y. 1. Under the Revised Statutes provision was made for drawing a jury. It will be observed that no such provision now exists, and the proceeding becomes an action at issue, and is tried in the same manner. Issues may be settled for the trial. In case the officer has no jurisdiction, appearing and participating in the proceedings does not conclude creditors. *Gracie v. Sheldon*, 3 Barb. 232. Otherwise if the discharge is consented to. *Lee v. Curtiss*, 17 Johns 85. But if they do not appear they are concluded except as to jurisdictional questions. *Matter of Bradstreet*, 13 Johns. 385; *Soule v. Chase*, 39 N. Y. 342; *People v. Stryker*, 24 Barb. 649. A creditor may examine into all the facts as to disposition of insolvent's property. *Cohen's Case*, 10 Abb. 257.

Specifications of Objections and Demand for Jury.

(Title as before.)

To the County Court of the County of Ulster:

I, Eliza Wilson, one of the creditors of the said Charles Ramsey, do hereby object to the discharge of said Charles Ramsey as an insolvent debtor, and specify the following grounds of my objections to such discharge:

1. That since the making of the schedule annexed to the petition he has transferred property of the value of \$2,000 to his wife, without consideration therefor, with intent to defraud his creditors.
2. That within two years last past he has, at different times and places, sold and transferred both real and personal property to creditors

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in payment of an antecedent debt. And I hereby demand that the questions of fact arising hereupon be tried by a jury.

(Date.)

(Signature of party or attorney.)

The insertion in the schedule of the name of the creditor, with a memorandum that his claim is barred by limitation, is not an admission that he is a creditor, so as to entitle him to appear and oppose without proofs. *Avery's Case*, 6 Abb. 144.

Objections to Discharge of Insolvent Debtor. (4 App. Div. 301.)

COUNTY COURT—OF ULSTER COUNTY.

In the Matter of the Application of
Anthony W. Dimock,
An Insolvent Debtor, etc.

The Farmers' Loan & Trust Company, one of the creditors of the said Anthony W. Dimock, appearing herein by Turner, McClure & Rolston, their attorneys, opposes the discharge of the said Dimock from his debts, and makes the following specifications of its objections to his discharge:

1. It objects to the discharge of the said Dimock on the ground that said Dimock, as it is informed and believes, is not a resident of the town of Denning, in said county of Ulster, or of any other place in said county of Ulster.

2. It objects to the discharge of the said Dimock for the reason that there is not annexed to said Dimock's petition written instruments executed by the creditors of said Dimock amounting to not less than two-thirds of all his debts, and that the alleged consents annexed to said petition are not properly executed and certified.

On information and belief, this creditor alleges that the amount of the indebtedness to all of the persons, firms, and corporations executing said consents, is much less than two-thirds of the debts owed by said Dimock to creditors residing within the United States, and the claims of said consenting creditors was incorrectly stated in said consents.

3. That this creditor objects to the discharge of said Dimock on the ground that the schedule attached to said Dimock's petition herein, as this creditor is informed and believes, does not contain a full and true statement of all his creditors, and does not contain a statement of the places of residence of each creditor, and it does not contain a statement of the sum which said Dimock owed to each creditor and the nature of the debt or demand arising on written security, on account, or otherwise, and does not contain a statement of the true cause and consideration of said Dimock's indebtedness to each creditor and the place where the indebtedness accrued; and it does not contain a statement of all existing judgments, mortgages, collaterals, or other securities for the payment of the debts of the said Dimock, and does not contain a complete and true inventory of all his property, in law or in equity, and the

Art. 4. When Insolvent Discharged and Proceedings thereon.

incumbrances existing thereon, and of the books, vouchers, and securities relating thereto.

Wherefore, this creditor prays that the application of the said Dimock to be discharged from his debts be denied.

TURNER, McCLURE & ROLSTON,
Attorneys for the Farmers' Loan & Trust Co.

(Add verification.)

ARTICLE IV.

WHEN INSOLVENT DISCHARGED AND PROCEEDINGS THEREON.

§§ 2173-2180.

§ 2173. When insolvent cannot be discharged.

In either of the following cases the petitioner is not entitled to a discharge :

1. Where it appears upon the hearing or trial that, after making the schedule annexed to his petition, he has collected a debt or demand, or transferred, absolutely, conditionally, or otherwise, any of his property not exempt by law from levy and sale by virtue of an execution, and he neglects or refuses forthwith to pay over to the clerk the full amount of all debts and demands so collected, and the full value of all property so transferred, except so much of the money, and of the value of the property, as appears to have been necessarily expended by him for the support of himself or his family.

2. Where it appears in like manner that the petitioner, within two years before presenting the petition, has, in contemplation of his becoming insolvent, or of his petitioning for his discharge, or knowing of his insolvency, made an assignment, sale, or transfer, either absolute or conditional, of any of his property, or of any interest therein, or confessed a judgment, or given any security, with a view of giving a preference to a creditor for an antecedent debt.

Sections 23 and 24, R. S., am'd ; L. 1854, ch. 147.

§ 2174. When assignment to be directed.

An order, directing the execution of an assignment, must be made by the court, where it appears by the verdict of the jury ; or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court, as follows :

1. That the petitioner is justly and truly indebted to the consenting creditors, in sums which amount, in the aggregate, to two-thirds of all the debts, which the petitioner owed at the time of presenting his petition to creditors residing within the United States.

2. That he has honestly and fairly given a true account of his property.

3. That he has in all things conformed to the matters required of him by this article.

Id. §§ 25 and 26, am'd.

§ 2175. Assignment ; contents, and to whom made.

The order must designate one or more trustees, residents of the State ; and must direct the petitioner to execute, to him or them, an assignment of all his property, at law, or in equity, in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution. The assignment

 Art. 4. When Insolvent Discharged and Proceedings thereon.

must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county. Where it appears, from the schedule, or otherwise, that real property will pass thereby, it must be also recorded as a deed, in the proper office for recording deeds of each county where the real property is situated.

Id. § 25, in part ; also, § 20, art. 7, R. S.

§ 2176. Id. ; trustees, how designated.

The trustee or trustees may be nominated by a majority in amount of the consenting creditors. If no person is so nominated, one or more persons must be appointed by the court for the purpose. The nomination may be included in the consent, or made in a separate paper, or orally upon the hearing or trial, and entered in the minutes.

Section 27, R. S.

§ 2177. Effect of assignment.

The assignment vests in the trustee or trustees all the petitioner's interest, legal or equitable, at the time of its execution, in any real or personal property, not exempt by law from levy and sale by virtue of an execution ; and any contingent interest which may vest within three years thereafter. When a contingent interest so vests, it passes to the trustees, in the same manner as it would have vested in the petitioner if he had not made an assignment.

Id. § 28.

2178. When discharge to be granted.

Upon the production by the petitioner of a certificate of the trustee or trustees, duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, to the effect that the insolvent has assigned for the benefit of all his creditors, all his property so directed to be assigned, and all the books, vouchers, and papers relating thereto, and that he has delivered so much thereof as is capable of delivery ; and also of a certificate of the county clerk, that the assignment has been duly recorded in his office ; the court must grant to the insolvent a discharge from his debts, which has the effect declared in the following sections of this article.

Id. § 29.

§ 2179. Proceedings where trustee refuses to give certificate, etc.

If a trustee refuses or neglects, upon payment or tender by the petitioner of the expense of so doing, to execute or acknowledge a certificate, as prescribed in the last section, or to cause the assignment to be recorded as therein prescribed, the court, upon proof by affidavit of the facts, must make an order requiring the trustee to show cause, at a time and place therein specified, why the petitioner should not be discharged, notwithstanding his neglect or refusal ; and why the trustee's appointment should not be revoked.

Sec. 23, art. 7, R. S.

§ 2180. The same.

If, upon the return of the order, it appears that the assignment has been duly executed, and that the petitioner has duly delivered all his property directed to be assigned, and all the books, vouchers, and papers relating thereto, which are capable of delivery, the court may, either

1. Grant a discharge of the petitioner, notwithstanding the neglect or refusal of the trustee ; or
2. Make an order revoking the appointment of the trustee. Upon the entry of such

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an order the powers of the trustee and his interest in the assigned property cease. If there is no other trustee the court must, by the same or another order, appoint one or more new trustees. Such an appointment has the same effect as if the person or persons so appointed were named as trustees in the original assignment.

An assignment of all the debtor's property to trustees for the payment of his debts is, against the debtor, conclusive evidence of his insolvency at the time of its execution, and such an assignment, giving preference to some creditors in the payment of their demands, is a bar to the discharge of the debtor from his debts which existed when the assignment was made. *Morewood v Hollister*, 6 N. Y. 309. And so also the debtor will be prevented from obtaining his discharge under the statute where, in contemplation of applying for such a discharge, he confesses judgment on which his property is sold, although it be confessed to a trustee for the benefit of all his creditors without preference, the judgment and sale under it being considered a fraud under the statute. *Matter of Hurst*, 7 Wend. 239. Such assignments will, it seems, not have the effect to render the discharge invalid, but it is cause only for defeating the insolvent's application on the hearing before the officer, or if the discharge is granted notwithstanding the objection of reversing the proceedings on direct review. *Stryker v. Stryker*, 24 id. 649; *Rusher v. Sherman*, 28 id. 416; *Matter of Hurst*, 7 Wend. 240; *Hayden v. Palmer*, 24 id. 364. The general principle as to when an insolvent or imprisoned debtor can obtain his discharge in different proceedings are laid down as follows: A discharge will not be denied on the ground that the petitioner's firm has made a fraudulent disposition of his property, unless it is shown affirmatively that he participated therein. *Ex parte Benson*, 60 How. 314. To bar a discharge some fraudulent act must be shown committed after the liability to the opposing creditor was incurred. *Ex parte Pearce*, 29 Hun, 270. The fraud which will bar a discharge under the statute is one perpetrated in the proceeding, not one in the creation of the debt. *Develin v. Cooper*, 84 N. Y. 410. Where the schedule annexed to the petition shows the absence of jurisdiction upon its face the discharge is void. *Morrow v. Freeman*, 61 N. Y. 515. Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the Court of Common Pleas of the city of New York, and having been fully heard has been decided against him on the merits,

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held, that the matter should be regarded as *res adjudicata*, and the application denied. *Matter of Roberts*, 10 Hun, 253, reversed on another point, 70 N. Y. 5. An application for a discharge should not be denied merely because the debtor has inadvertently omitted some property from his schedule, but if on his examination he remembers such property the court should allow him to amend his petition by inserting it, if satisfied that the omission was not intentional or fraudulent. *Matter of Rosenberg*, 10 Abb. (N. S.) 450. As to what facts throw suspicion upon the good faith and honesty of the proceedings of an insolvent seeking a discharge under this act, see *Cohen's Case*, 10 Abb. 257. It was *held*, upon an application for his discharge by an imprisoned debtor, under part 2, chapter 5, title 1, Article VI., of the Revised Statutes, that he was not entitled to such discharge, where he has disposed of his property with intent to defraud the creditor at whose suit he was imprisoned; also, that it was not necessary to show that the fraudulent disposition of his property by the debtor was made by him with a view to instituting proceedings for discharge. It seems, however, that to prevent a discharge existing creditors must have been defrauded, and not those whose claims have been paid or have ceased to exist. A creditor cannot contest the discharge, who is in no way injured or defrauded. *Matter of Brady*, 69 N. Y. 217. It seems that an assignment two years before the proceedings for discharge as an insolvent is not within the condemnation of subdivision 2, § 2173. *Matter of Dimmock*, 4 App. Div. 310.

When an order for assignment has been made the officer making it cannot afterward vacate it, unless there has been surprise on the opposing creditors, or they have been misled by the opposite party. *Matter of Bradstreet*, 13 Johns. 385.

Order Dismissing Petition for Discharge. (4 App. Div. 301.)

At a term of the county court of Ulster County, held at the city of Kingston, on the 5th day of April, 1895 :

Present :—Hon. A. T. Clearwater, *County Judge*.

In the Matter of the Application of Anthony W. Dimock.	}
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Anthony W. Dimock, an insolvent debtor, having heretofore filed his petition in this court, verified the 2d day of October, 1893; and

 Art. 4. When Insolvent Discharged and Proceedings thereon.

an order having thereupon been made dated October 2, 1893, directing that all the creditors of the said Anthony W. Dimock show cause at a term of this court to be held at the county judge's chambers, in the city of Kingston, on the 15th day of November, 1893, at 11 o'clock in the forenoon of that day, why an assignment of the said insolvent property should not be made, and he be thereupon discharged from his debts, as described in Article I. of title I. of chapter 17 of the Code of Civil Procedure.

And said matter having come on to be heard on the said 15th day of November, 1893, at 11 o'clock in the forenoon of that day, and the said Anthony W. Dimock, petitioner, having appeared on said day by ———, his counsel, and ———, Esq., having appeared as counsel for certain objecting creditors, and the matter having been adjourned to the 23d day of November, 1893, and the matter then having come on to be heard before said county judge, and the said petitioner having appeared by ———, Esq., his counsel, and ———, ———, and ——— being creditors objecting having appeared by ———, their counsels, and the said objecting creditors having made certain preliminary objections to the proceedings, which were overruled, and the Farmers' Loan & Trust Company, having thereupon filed notice of appearance by Turner, McClure & Rolston, its attorneys, and having filed specifications of objection to the discharge of said Anthony W. Dimock, verified November 10th, 1893, (add similar statement for all other objecting creditors), and the issues raised by the several specifications of objection having been duly tried before the court, and due deliberation had thereon, and after hearing ———, of counsel for the petitioner, and ———, ———, and ———, of counsel for the objecting creditors.

On motion of ———, attorneys for Farmers' Loan & Trust Company and other objecting creditors, it is

Ordered, that the said petition of Anthony W. Dimock be, and the same is hereby dismissed on the merits with costs to the Farmers' Loan & Trust Company and others represented by Messrs. Turner, McClure & Rolston, and with costs to the United States National Bank, an objecting creditor.

A. T. CLEARWATER,
Ulster County Judge.

A true copy of the whole thereof of order entered this 5th day of April, 1895, in my office.

Given under my hand and seal of this court, this 5th day of April, 1895.

GEORGE S. SLEIGHT,

Clerk.

Art. 4. When Insolvent Discharged and Proceedings thereon.

Order for an Assignment.

At a Special Term of the county court, held at the chambers of the judge thereof, in the city of Kingston, Ulster County, on the 17th day of March, 1883 :

Present :—Hon. William Lawton. *County Judge of Ulster County.*

In the Matter of the Application of Charles Ramsey, an Insolvent Debtor, for his discharge from his debts.

It appearing to the court from the proofs of the respective parties to this proceeding that the petitioner, Charles Ramsey, is justly and truly indebted to the consenting creditors in sums which amount in the aggregate to two-thirds of all the debts which the said petitioner owed at the time of presenting his petition in this proceeding to creditors residing within the United States : that said petitioner has honestly and fairly given a true account of his property, and has in all things conformed to the matters required of him by Article I. of title 1 of chapter 17 of the Code of Civil Procedure, it is now, on reading all the papers and proceedings herein and the proofs taken herein, and on proof of due publication and service of the order requiring creditors to show cause, granted therein on the 29th day of September, 1882, and on motion of A. W. Cooper, of counsel for the petitioner, and no one opposing,

Ordered, that the petitioner, Charles Ramsey, execute to Anthony Benson, of the said city of Kingston, as trustee, who is hereby designated as a trustee for that purpose, an assignment of all his, said petitioner's, property at law or in equity, in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale by execution.

WILLIAM LAWTON,
County Judge of Ulster County.

Insolvent's Assignment.

ULSTER COUNTY COURT.

In the Matter of the Application of Charles Ramsey, an Insolvent Debtor, for his discharge from his debts.

Know all men by these presents, that I, Charles Ramsey, an insolvent debtor, did, in conjunction with so many of my creditors residing within the United States whose debts in good faith amount to two-thirds of all the debts owing by me to creditors residing within the United States, present a petition to the county court of Ulster County, praying for relief, pursuant to the provisions of the statute authorizing an insolvent debtor to be discharged from his debts, whereon the said county court ordered notice to be given to all my creditors to show cause, if any they had, before it, at a certain day and place, why the prayer of the said petition should not be granted,

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which notice was duly published and served as required by law, and no good cause appearing to the contrary, and the said county court being satisfied that I have in all things conformed to those matters required by the said statute, has directed an assignment of all my estate to be made by me for the benefit of all my creditors :

Now, therefore, know ye, that in conformity to the said direction I have granted, leased, assigned, and set over, and by these presents do grant, release, assign, and set over unto Anthony Benson, trustee, appointed to receive the same, all my estate, real and personal, both in law and equity, in possession, reversion, or remainder, and all books, vouchers, and securities relating thereto, to hold the same unto the said assignee to and for the use of all my creditors, except so much thereof as is exempt by law from levy and sale by virtue of an execution.

In witness whereof I have hereunto set my hand and seal, this 28th day of March, 1883.

(Add acknowledgment.)

An assignment of all the debtor's estate, real and personal, passes title to all the lands which he owns without further description, and, therefore, lands owned by him, though not mentioned in his inventory, pass by such assignment. *Roseboom v. Mosier*, 2 Denio, 61. Property held in trust does not pass by the assignment, and if such property remains in specie, or in goods and notes, or other choses in action, the *cestui que trust* is entitled to the property, and not the general creditors of the insolvent. Though the trust property is converted into money, yet if it is kept separate and distinct, so that it can be traced and distinguished from the general mass of the insolvent's estate, it will go on to the *cestui que trust*. *Kip v. Bank of New York*, 10 Johns. 63; *Kennedy v. Strong*, id. 289. Where property has been fraudulently conveyed by an insolvent debtor under the statute, his interest in the property passes to the assignee for the benefit of his creditors, although not embraced in the inventory. *Ward v. Van Bokkelen*, 2 Paige, 289. The assignee takes the property subject to any equitable lien in a third person. *Waddington v. Vredenburg*, 2 Johns. Cas. 227. The title to the property of the insolvent cannot be affected until it is assigned. Under the statute the insolvent may at any time terminate his proceedings, and is not bound to complete them, and he may sell the property, and although such an act would be a fraud upon the proceedings, the purchaser would obtain a good title; the creditors obtain no lien until the discharge, and the debtor is not divested of control until that time. He may make a conveyance if he

 Art. 4. When Insolvent Discharged and Proceedings thereon.

sees fit. *Bailey v. Burton*, 8 Wend. 339. It is said a deed, showing upon its face that it is an assignment made by an insolvent to obtain his discharge under the statute relating to voluntary assignments, is sufficient to support an action of ejectment by the assignee, where there is no affirmative evidence of any invalidity in the insolvency proceedings. *Rockwell v. Brown*, 54 N. Y. 210.

An assignment, purporting to be made under the Two-Thirds Act, is invalid as a conveyance of the insolvent's estate, at least as against one not a *bona fide* purchaser without notice, where the preliminary proceedings are void because not in conformity to the statute, so held where petition was fatally defective. *Rockwell v. McGovern*, 69 N. Y. 294. The petitioner must assign all the property he has at the time he is ordered to make the assignment, and there must be some evidence of a delivery to the assignee. *Borthwick v. Howe*, 27 Hun, 505.

A discharge with the assent of two-thirds of the creditors is void unless the debtor's affidavit conforms to the statute, and will not protect his future acquisitions. Its invalidity may be set up by a future execution creditor. *Hale v. Sweet*, 40 N. Y. 97. In order to make the discharge conclusive it is necessary that the officer have jurisdiction, and there must, for that purpose, be a petition, signed by the debtor and by two-thirds of his creditors residing within the United States, the affidavit of the petitioning creditors taken before an officer authorized to take affidavits to be used in courts of record, to the amount, nature, and consideration of the debt, and that the creditor has received no consideration to become a petitioner; a full and true account of the creditors, the amounts due, the consideration, a statement of any security, and a full inventory, an affidavit by the debtor and before the court, of the correctness of his petition and proof of residence within the county where proceedings are had. *Rusher v. Sherman*, 28 Barb. 416. The recitals of the discharge are conclusive evidence of all proceedings except matters going to the jurisdiction, and the record need not be produced. *Barber v. Winslow*, 12 Wend. 102; *Jenks v. Stebbins*, 11 Johns. 224; *Lester v. Thompson*, 1 id. 300; *Stanton v. Ellis*, 12 N. Y. 575; *Bullymore v. Cooper*, 46 id. 236; *Develin v. Cooper*, 84 id. 410; although it is not the only evidence of the proceedings. *Richmond v. Praim*, 24 Hun, 578. The discharge is *prima facie* evidence as to matters of jurisdiction.

Art. 4. When Insolvent Discharged and Proceedings thereon.

Trustees' Certificate.

ULSTER COUNTY COURT.

In the Matter of the Application of Charles
Ramsey, an Insolvent Debtor, for his dis-
charge from his debts.

I, Anthony Benson, of the city of Kingston, Ulster County, New York, hereby certify that Charles Ramsey, an insolvent debtor, has this day granted, conveyed, assigned, and delivered to me, for the use and benefit of all his creditors, all his estate, real and personal, both in law and equity, in possession, reversion, or remainder, and all books, vouchers, and securities relating to the same, except so much thereof as is exempt from levy and sale by virtue of an execution, and has delivered so much thereof as is capable of delivery.

In witness whereof, I have hereunto set my hand and seal, this
28th day of March, 1883. (Signature.)

Certificate of Record by Clerk.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

I, Jacob D. Wurts, clerk of the county of Ulster, do hereby certify that an assignment of all the estate, real and personal, both in law and equity, in possession, reversion and remainder, and all books, vouchers and securities relating thereto, except so much thereof as is exempt from levy and sale by virtue of an execution of Charles Ramsey, an insolvent debtor, made by the said Charles Ramsey to Anthony Benson to and for the use of the creditors of the said Charles Ramsey, and dated the 28th day of March, 1883, was duly recorded in the clerk's office of said county on the 28th day of March, 1883.

In witness whereof I have hereunto subscribed my name and
[L. S.] affixed my official seal, this 28th day of March, 1883.

JACOB D. WURTS,
Clerk.

Discharge.

At a term of the Ulster County court, held in and for the county of
Ulster, at the chambers of the county judge, in the city of King-
ston, on the 31st day of March, 1883 :

Present :—Hon. William Lawton, *County Judge*.

In the Matter of the Application of Charles
Ramsey, an Insolvent Debtor, for his dis-
charge from his debts.

To all to whom these presents shall come or may concern :

WHEREAS, Charles Ramsey, an insolvent debtor, residing within

Art. 5. Discharge and its Effect.

the city of Kingston, said county of Ulster, did, in conjunction with so many of his creditors, residing within the United States, as have debts in good faith owing to them by the said insolvent, amounting to at least two-thirds of all the debts owing by him to creditors within the United States, present a petition to the Ulster County court, on the 29th day of September, 1882, praying that the estate of the said insolvent might be assigned for the benefit of his creditors and he be discharged from his debts, pursuant to the provisions of the statute authorizing an insolvent debtor to be discharged from his debts, to which petition was annexed the schedule required by law, duly verified, with the proper consents of said creditors, accompanied by the affidavits required by law. Whereupon the said court ordered notice to be given, as required by law, to all the creditors of the said insolvent, to show cause, if any they had, before it, at a certain time and place, why an assignment of the said insolvent's estate should not be made and he be discharged from his debts; proof of the service whereof on the creditors of said insolvent, as required by law, and of the publication whereof has been duly made; and

WHEREAS, It satisfactorily appearing to the court that the proceedings on the part of the creditors are just and fair, and that the said insolvent has conformed in all things to those matters required of him by law, an order was made by said court directing an assignment to be made by the said insolvent of all his estate, real and personal, both in law and equity, in possession, reversion, or remainder, except so much thereof as is exempt from levy and sale by virtue of an execution to Anthony Benson, trustee, therein designated to receive the same; and the said insolvent having, on the 28th day of March, 1883, made such assignment, and produced a certificate thereof, executed by the said trustee and duly proved, and also a certificate of the clerk of said county of Ulster that such assignment is duly recorded in his office:

Now, therefore, know ye, that by virtue of the power and authority in said court vested, the said insolvent is hereby discharged from all his debts and from imprisonment therefor, pursuant to the provisions of the said statute.

Witness, Hon. William Lawton, county judge of Ulster County, [L. s.] at his chambers in said city of Kingston, county of Ulster and State of New York, this 31st day of March, 1883.

WM. LAWTON,

County Judge of Ulster County.

JACOB D. WURTS,

Clerk of Ulster County and County Court.

ARTICLE V.

DISCHARGE AND ITS EFFECT. §§ 2181-2187.

§ 2181. Discharge, etc., to be recorded.

The discharge, and the petition, affidavits, orders, schedule and other papers upon which the discharge is granted, exclusive of the minutes of testimony, must be re-

 Art. 5. Discharge and its Effect.

corded in the clerk's office of the county, within three months after the discharge is granted. In default thereof, the discharge becomes operative, from and after that time. The original discharge, the record thereof, or a transcript of the record duly authenticated, is conclusive evidence of the proceedings and facts therein contained. The other papers specified in this section, the record thereof, or a transcript of the record duly authenticated, are presumptive evidence of the proceedings and facts therein contained.

L. 1866, ch. 116 (6 Edm. 701).

§ 2182. [Am'd 1883.] Effect of discharge.

Except as prescribed in the next two sections, a discharge, granted as prescribed in this article, exonerates and discharges the petitioner from every debt, due at the time when he executed his assignment, including a debt contracted before that time, though payable afterwards; and from every liability incurred by him, by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange, before the execution of his assignment; or incurred by him, in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment. At any time after one year has elapsed, since the recording of the discharge, and the petition, affidavits, orders, schedule, and other papers upon which the discharge was granted, as prescribed in section twenty-one hundred and eighty-one of this act, the petitioner may apply, upon proof of his discharge, to the court in which a judgment shall have been rendered against him, for an order directing the judgment to be cancelled and discharged of record. If it appears that he has been discharged from the payment of that judgment, an order must be made accordingly, and thereupon the clerk must cancel and discharge the docket thereof, as if the proper satisfaction-piece of the judgment was filed. Notice of the application, accompanied with copies of the papers upon which it is made, must be given to the judgment creditor, unless his written consent to the granting of the order was satisfactory proof of the execution thereof, and if he is not the party in whose favor the judgment was rendered, that he is the owner thereof, is presented to the court upon the application.

§ 2183. Id. ; exception as to foreign contracts or creditors.

In either of the following cases, such a discharge does not affect a debt or liability, founded upon a contract, unless it was owing, when the petition was presented, to a resident of the State; or the creditor has executed a consent to the discharge; or has appeared in the proceedings; or has received a dividend from the trustee:

1. Where the contract was made with a person not a resident of the State.
 2. Where it was made and to be performed without the State.
 3. Where the creditor was not, at the time of the discharge, a resident of the State.
- See §§ 30 and 31, art. 3, R. S.

§ 2184. Id. ; as to debts, etc., to the United States and the State.

Such a discharge does not affect:

1. A debt or duty to the United States, or
2. A debt or duty to the State, for taxes or for money received or collected by any person as a public officer, or in a fiduciary capacity, or a cause of action specified in § 1969 of this act, or a judgment recovered upon such a cause of action.

Except as prescribed in this section, the discharge exonerates the petitioner from a debt or other liability to the State, in like manner and to the same extent, as from a debt or liability to an individual.

Art. 7, §§ 29 and 30, R. S. am'd; L. 1859, ch. 2.

Art. 5. Discharge and its Effect.

§ 2185. Insolvent to be released from imprisonment.

If, at the time when the discharge is granted, the petitioner is under arrest, by virtue of an execution against his person issued, or an order of arrest made, in an action or special proceeding, founded upon a debt or liability from which he is discharged, as prescribed in the foregoing sections of this article, he must be released from the arrest, upon producing to the officer his discharge, or a certified copy of the record thereof. If the adverse party wishes to test the validity of the discharge, he may procure a new order of arrest, or cause a new execution to be issued, as the case requires.

Art. 3, § 34, R. S.

§ 2186. Discharge, when void.

A discharge, granted as prescribed in this article, is void, in either of the following cases :

1. Where the petitioner wilfully swears falsely, in the affidavit annexed to his petition or schedule, or upon his examination in relation to any material fact, concerning his property or his debts, or to any other material fact.

2. Where, after presenting his petition, he sells, or in any way transfers or assigns, any of his property, or collects any debt or demand owing to him, and does not give a just and true account thereof, upon the hearing or trial, and does not pay the money so collected, or the value of the property so sold, transferred, or assigned, as prescribed in this article.

3. Where he secretes any part of his property, or a book, voucher, or paper relating thereto, with intent to defraud his creditors.

4. Where he fraudulently conceals the name of any creditor, or the sum owing to any creditor, or fraudulently misstates such a sum.

5. Where, in order to obtain his discharge, he procures any person to become a consenting creditor wilfully, intentionally, and knowingly for a sum not due from him to that person in good faith, or for a sum greater than that for which the holder of a demand, purchased or assigned, is deemed a creditor, as prescribed in this article.

6. Where he pays, or consents to the payment of, any portion of the debt or demand of a creditor, or grants or consents to the granting of any gift or reward to a creditor, upon an express or implied contract, trust, or understanding, that the creditor so paid or rewarded should be a consenting creditor, or should abstain or desist from opposing the discharge.

7. Where he is guilty of any fraud whatsoever, contrary to the true intent of this article.

Art. 3, § 35, R. S., am'd.

§ 2287. Invalidity may be proved on motion to vacate order of arrest, etc.

Where a person, who has been discharged as prescribed in this article, is afterwards arrested by virtue of an order of arrest made, or an execution issued, in an action founded upon a debt or liability from which he is so discharged, the adverse party may oppose his application to be released from the arrest by proof, by affidavit, of any cause for avoiding the discharge, for want of jurisdiction, or as specified in the last section. If such a cause is established, the application must be denied.

It was held in *Barnes v. Gill*, 13 Abb. (N. S.) 164, that the omission to file the papers leaves the discharge inoperative until they are filed, and a levy made meanwhile is valid, and the right vesting under it is not affected by the subsequent filing of the

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papers. The discharge is made operative from the time of filing, upon debts which were due at or before the filing of the discharge, and this case was followed in *Mills v. Hildreth*, 5 Hun, 364. It will be seen that as to the effect of subsequent filing the provisions of this section differ from the statute under which these decisions are made. The discharge exonerates the insolvent from all liabilities incurred by him by making or indorsing any promissory note previous to the execution of the assignment, or incurred by him in consequence of the payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior or subsequent to the execution of the assignment by such insolvent. *Ford v. Andrews*, 9 Wend. 312. The debts of the insolvent on contract are discharged even though the creditor be a non-resident and did not unite in the petition nor accept a dividend, where the contract was made in this State, or where the contract was to be executed in this State, or where the creditor was, at the time of the first publication of notice, a resident of this State. The creditor is also bound in case he united in the petition or accepted a dividend, if the proceedings are valid, even if a non-resident. *Parkinson v. Scoville*, 19 Wend. 150; *Van Hook v. Whitlock*, 7 Paige, 373.

But where the contract was to be performed out of the State and the creditor is a non-resident and takes no part in the proceedings, the discharge is inoperative, *Soule v. Chase*, 39 N. Y. 342; *Donnelly v. Corbett*, 3 Seld. 500. As between citizens of the same State the discharge is valid. But the discharge will not exonerate the debtor from liability upon a contract made in another State between parties not inhabitants of this State at the time the contract was made, although previous to presenting the petition they became such inhabitants. A discharge obtained in this State is no defence to an action by a citizen of another State upon a note given before the proceedings for a discharge, although such note is made payable and the action is brought in this State. *Pratt v. Chase*, 44 N. Y. 597. This rule is applicable, though the debt due is a judgment which was recovered within the State where the discharge was obtained. *Lester v. Christalar*, 1 Daly, 29. The effect of the discharge upon negotiable paper is to destroy its negotiability: it discharges the debt for which the note was given, the note becomes worthless, and the person

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to whom it is transferred, after the discharge, acquires no right to maintain an action upon it. *De Puy v. Swartz*, 3 Wend. 135; *Moore v. Vick*, 4 id. 420; *Ocean National Bank v. Olcott*, 46 N. Y. 12. The discharge operates also to discharge a previously existing judgment obtained against the debtor even though judgment was obtained for a tort. It extinguishes the judgment as effectually as if it had been paid or released. *Smith v. Bennett*, 17 Wend. 479; *Luther v. Deyo*, id. 629; *Hayden v. Palmer*, 24 id. 364; *Deyo v. Van Valkenburgh*, 5 Hill, 242. But where judgment was not entered in such an action before discharge, the discharge does not protect the debtor. *Hodges v. Chase*, 2 Wend. 248; *Matter of Pic*, 10 Abb. 409. If the judgment was, however, entered, after discharge on verdict in an action on contract, the discharge protects the debtor. *Baker v. Taylor*, 1 Cow. 165. It is said the discharge of one of two joint debtors, before payment by his co-debtor, will not affect the claim of the co-debtor for contribution against the discharged debtor toward the payment of the debt by the other, made subsequent to the insolvent assignment. *Ransom v. Keyes*, 9 Cow. 128; *Ellsworth v. Caldwell*, 27 How. 188; *Ellsworth v. Caldwell*, 48 N. Y. 680. It was held, where the creditor unites with one or two joint debtors for a discharge, the granting of the discharge releases the other joint debtor. *Alger v. Raymond*, 25 How. 593. As to this, see § 2156. The discharge is not conclusive as to the facts requisite to give the court jurisdiction. *Stanton v. Ellis*, 12 N. Y. 575; *Barber v. Winslow*, 12 Wend. 102; *Hale v. Sweet*, 40 N. Y. 97; *Rusher v. Sherman*, 28 Barb. 416; *People v. Stryker*, 24 id. 649; *Salters v. Tobias*, 3 Paige, 338; *Rockwell v. Brown*, 42 How. 226. These cases hold the recitals in the discharge are *prima facie* evidence only of jurisdictional facts, although conclusive evidence as to all facts and proceedings not jurisdictional. After discharge has been granted, if the officer has acquired jurisdiction, it is conclusive in all other proceedings in which it comes in question, and no objections, except such as go to the jurisdiction, can be availed of in a collateral proceeding; the remedy is by direct review or by *certiorari*. The jurisdictional facts are those necessary to be stated in the original papers, upon which the order to show cause is founded, and irregularities in subsequent proceedings are cured by discharge when attacked collaterally. *Stanton v. Ellis*, 16 Barb. 317; *Matter of Underwood*, 3 Cow. 59,

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12 N. Y. and 28 Barb., *supra*. The defects and omissions in a discharge may be remedied by the introduction of proof outside the record. *Salters v. Tobias*, 3 Paige, 338; *Rusher v. Sherman*, 28 Barb. 416. It will not be presumed that an act required to be done was not performed because the recital is omitted from the discharge. *Rosevelt v. Kellogg*, 20 Johns. 211; *Salters v. Tobias*, 3 Paige, 338. To entitle an order of discharge to be put in evidence it is not sufficient that it shows general jurisdiction of the subject-matter, but that jurisdiction of the person and of the especial case was acquired by taking the necessary steps prescribed by statute to that end, and if the record fails in any of these particulars the fact must be proved *aliunde*. *Sellich v. Keeler*, 1 State Rep. 594.

An order cancelling and discharging judgments as provided in the latter part of this section will be vacated where it was granted without notice to the owner of the judgment, and without proof of his consent. Such owner of a judgment is entitled to have it vacated on merely showing want of notice, and he is not required to show why the discharge did not operate upon his judgment, or to show facts showing that the judgment should not have been cancelled. *Wheeler v. Emmeluth*, 121 N. Y. 243, 30 St. Rep. 920, 12 Supp. 58. Where a motion is made to discharge judgments of record pursuant to § 2182, it is no defence to the cancellation of such judgments that, in the list of creditors contained in the petitioner's petition, the name of a decedent creditor appeared instead of the name of his administrator, where there is no evidence that the petitioner was aware of the death of the creditor and it had recently happened. *Wheeler v. Emmeluth*, 58 Hun, 370, affirmed, 125 N. Y. 750; compare, however, *Starr v. Patterson*, 27 Abb. N. C. 19. This section regulating the effect of a discharge should be read in connection with the two following sections, which make exceptions as to foreign contracts with foreign creditors or contracts to be performed without the State, or debts due the United States, or to the State for taxes. The revisers held the following propositions settled, and cited the authorities named in their support, and endeavored to conform the section to those principles. No better interpretation of its meaning or citation of authorities bearing on the point seems possible.

“Since the enactment of the Revised Statutes most of the

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questions that can arise upon the subject have been authoritatively settled by the decisions of the Supreme Court of the United States, or by the Court of Appeals of this State, under which it is certain that the effect of the discharge under the laws of a State is too broadly stated in our present statute. It seems settled :

“*First.* That, unless the creditor has united in the application for the discharge, or has appeared in the proceedings in insolvency, or has received a dividend from the insolvent estate (*Clay v. Smith*, 3 Pet. 411,) a discharge under a State insolvent law does not extinguish a debt which was either contracted before the passage of such a law (*Farmers and Mechanics' Bank v. Smith*, 6 Wheat. 131; *Ogden v. Saunders*, 12 id. 213); or

“(b) Contracted with a citizen of another State or country (*Ogden v. Saunders*, 12 Wheat. 213; *Cook v. Moffat*, 5 How. [U. S.] 295; *Soule v. Chase*, 39 N. Y. 342; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297; *Van Hook v. Whitlock*, 26 Wend. 43; *Donnelly v. Corbett*, 7 N. Y. 500); or

“(c) Founded upon a contract made and to be performed without the State (*Suydam v. Broadnax*, 14 Pet. 67; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153; *Towne v. Smith*, 1 Woodb. & M. 115; *Byrd v. Badger*, 1 McAll. 263); or,

“(d) Due to a creditor who, at the time of the discharge, is a citizen of another State or country. *Sturges v. Crowninshield*, 4 Wheat. 123; *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank of Newberry*, id. 234; *Gilman v. Lockwood*, 4 id. 409.

“*Second.* That it makes no difference, in the application of the foregoing principles, that the creditor resorts to the courts of the State in which the discharge was granted. for the collection of his debt. *Donnelly v. Corbett*, 7 N. Y. 500; *Soule v. Chase*, 39 id. 342.

“We have endeavored to conform the section to the principles of these decisions. It may be doubted whether that section is not, even now, too broad, in subjecting to the operation of our insolvent laws a contract between citizens of the State, unless it was both made and to be performed without the State. But that question is not yet decisively settled, and in a doubtful case, it is proper for us to incline to the validity of our present statutes, and the jurisdiction of our own courts.”

The decree of the court of a sister State discharging a debtor

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residing in that State, is a bar to an action in this State by a creditor, also a resident of a foreign State, or his assignee. *Murphy v. Philbrook*, 6 Supp. 543, 57 Super. Ct. 204. The following decisions were made under the Revised Statutes: If a discharge is granted after judgment, as the debtor in such case has had no opportunity to plead the discharge, he will be released on motion, and a perpetual stay of proceedings granted as to the judgment. The execution will be set aside even though the creditor may impeach the judgment for fraud, yet he cannot disregard the discharge and issue execution and sustain it on the ground of fraud, and a levy will not be allowed to be sustained as security except where facts were presented showing the discharge presumptively fraudulent. *Parkinson v. Scoville*, 19 Wend. 150; *Dresser v. Shufeldt*, 7 How. 85; *Smith v. Pell*, 20 id. 97; *Rich v. Salinger*, 11 Abb. 344; *Stewart v. Sohlinger*, 14 id. 291, 10 id. 258; *Russell & Hall v. Packard*, 9 Wend. 431; *Reed v. Gordon*, 1 Cow. 50; *Noble v. Johnson*, 9 Johns. 259, 1 Caines, 249; *Baker v. Taylor*, 1 Cow. 165; *Cramer v. Blank*, 3 Sandf. 700. The discharge must be pleaded. *Cornell v. Dakin*, 38 N. Y. 253. And where the defendant has been guilty of laches or fraud, or neglected to plead when he had the opportunity, leave to plead will not be granted on application. *Holyoke v. Adams*, 59 N. Y. 233; *Medbury v. Swan*, 46 id. 200; *Barstow v. Hanson*, 2 Hun, 333; *Price v. Peters*, 15 Abb. 197; *Stewart v. Green*, 11 Paige, 535; *Rudge v. Rundle*, 1 T. & C. 649. But if the discharge comes too late to be pleaded, the debtor will be relieved on motion. *Dresser v. Brooks*, 3 Barb. 429; *Baker v. Judges of Ulster*, 4 Johns. 191. If the discharge is obtained after judgment the debtor should move for perpetual stay of execution. *Dresser v. Shufeldt*, 7 How. 85; *Mather v. Bush*, 16 Johns. 233; *Clark v. Rowling*, 3 Comst. 216. The discharge will not, on such motion, be set aside on affidavits. *Deyo v. Van Valkenburgh*, 5 Hill, 245; *Rich v. Salinger*, 11 Abb. 344. A reference may be ordered to test the validity of the discharge. *Stewart v. Sohlinger*, 14 Abb. 291.

The cases of *Rockwell v. Brown*, 54 N. Y. 210, and *Rockwell v. McGovern*, 69 id. 294, should be considered together in arriving at effect of insolvency proceedings. They seem to arise out of the same proceeding. In the first case it is held that "a deed, executed by a party in whom title is vested, and expressing a

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valuable consideration, never need, against him or those claiming under him, or as against a stranger, to be supported, by showing what other reasons beside the will of the party led to its execution. Insolvent and other similar proceedings only need to be shown in order to give effect to deeds given by persons in whom the title is not vested, and who derive their power to convey from the statute and proceedings under which they are acting. These principles, so obvious in their reason, have been long established, and have never been held as not in conformity with the statute." In the second case it was held that the grant failed with the other proceedings, and did not divest the insolvent of his title to his estate, citing *Ely v. Cooke*, 28 N. Y. 374. It is further held that the proceedings, having been without jurisdiction, no lawful discharge of the debtor from his debts could be granted under them. The purpose of the assignment failed, as also the consideration upon which it was founded.

It will thus be seen that the deed of the assignee conveys the debtor's title, provided the proceedings are not attacked and shown to be invalid, but that, in case the proceedings under the act are void, the assignment and conveyances under it are ineffectual. The statute is held to be special and strictly construed. Adjudications involving the principle are numerous, citing *Onderdonk v. Voorhees*, 36 N. Y. 358; *Baily v. Burton*, 8 Wend. 339; *Games v. Stiles*, 14 Pet. 322. In opinion of Reynolds, J., in 54 N. Y. 210, *supra*, it is further held that the assignee in the proceedings established a *prima facie* title to the premises, and it should have been received in evidence. In the later case (69 N. Y. 294, *supra*), it is said that this holding is not in conflict with the views there set forth, as it did not appear on the offer of the deed that the proceedings under which it was granted were void, and it is in the later case laid down as the correct rule that the assignment cannot be regarded as valid as a conveyance of the debtor's estate when the preliminary proceedings upon which it is based are void. The specification in the statute that certain acts and omissions shall vitiate the discharge implies that the decision of the judge is conclusive as to others. The fact that the true cause of indebtedness to the principal debtor was not set forth in the schedule, that the general ground of the indebtedness was omitted, and that no certificate of the recording of the assignment was presented to the

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judge, are not errors for which a discharge should be interfered with on *certiorari*. *People v. Stryker*, 24 Barb. 649. The mere omission of a creditor's name in the schedule, or a misstatement of the amount due, if not made with a fraudulent intent, will not invalidate the discharge. *Small v. Graves*, 7 Barb. 576. Where the schedule shows on its face that the creditors joining do not own two-thirds of the debts owing by the insolvent to creditors residing in the United States, the officer acquires no jurisdiction, and a discharge based on the petition is void. *Morrow v. Freeman*, 61 N. Y. 515. The seventh subdivision is construed in *Devlin v. Cooper*, 84 N. Y. 410, to mean that the fraud that renders a discharge void under the statutory provision referred to is one done in the proceedings under the statute to obtain a discharge, and not a fraud that has gone before, and in which the making of a debt was involved. Where the debtor omits to insert the name of a creditor in the sworn schedule, the discharge is void and he is not excused for such omission by showing that he was advised by his counsel that he had a good defence to the claim. Such an omission is not cured by afterwards inserting the name in the schedule, if it were intentionally omitted under circumstances indicating fraud. *Starr v. Patterson*, 27 Abb. N. C. 19; but compare *Wheeler v. Emmeluth*, 58 Hun, 370, affirmed, 121 N. Y. 750.

See *Matter of Dimock*, 4 App. Div. 305, for facts which seem to be in violation of sub. 5 of § 2186, providing that the discharge is void where the petitioner procures a person to be a consenting creditor, and also facts which seem to be in violation of sub. 6, providing that the discharge is void if the petitioner grants any gift or reward to a creditor for becoming a consenting creditor. It seems that one not a creditor, and who has no interest to be affected by the discharge, cannot have a *certiorari* to vacate it. *People v. Stryker*, 24 Barb. 649. Objections other than those relating to the jurisdiction cannot, after discharge, be raised collaterally, but must be reviewed directly. *Rusher v. Sherman*, 28 Barb. 416; *People v. Schell*, 5 Lans. 332; *Soule v. Chase*, 39 N. Y. 342. The proceedings are not amendable as to matters which go to the jurisdiction. *Small v. Wheaton*, 2 Abb. 175. But as to other matters an amendment may be allowed, as, for instance, that the schedule did not show the consideration for debts owing by the insolvent. *Matter of Hurst*, 7 Wend.

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239; *Matter of Rosenberg*, 10 Abb. (N. S.) 450; *People v. Stryker*, 24 Barb. 649; *Soule v. Chase*, 1 Abb. (N. S.) 48; *Stanton v. Ellis*, 16 Barb. 319; *Brodie v. Stephens*, 2 Johns. 289; *Morewood v. Hollister*, 6 N. Y. 309. The remedy, by way of review, was formerly by writ of *certiorari* under the statute, on allowance by a justice of the Supreme Court; under it the court was not limited in the examination to the questions of jurisdiction of the officer and the regularity of the proceeding, but might examine and correct any erroneous decision of the officers upon a question of law. *Morewood v. Hollister*, 6 N. Y. 309. This provision of the statute was repealed, and not re-enacted in the Code, and under the provisions of § 2121, with reference to *certiorari*, the writ cannot now issue to review the determination of a court in a special proceeding. The remedy is, therefore, by appeal, which goes to the General Term as from other adjudications in special proceedings.

CHAPTER X.

EXEMPTION FROM ARREST OR DISCHARGE FROM IMPRISONMENT OF AN INSOLVENT DEBTOR.

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ARTICLE I.

DISCHARGE OF INSOLVENT DEBTOR. THE PETITION AND PAPERS. §§ 2188-2191.

§ 2188. [Am'd, 1895.] Who may be exempted, and by what court.

An insolvent debtor may be exempted from arrest, or discharged from imprisonment, as prescribed in this article. For that purpose, he must apply, by petition, to the county court of the county in which he resides, or is imprisoned; or, if he resides or is imprisoned in the city of New York, to the Supreme Court. A person who has been admitted to the jail liberties is deemed to be imprisoned within the meaning of this article.

2 R. S. 28, § 1 (2 Edm. 29); L. 1895, ch. 946. See § 2200.

§ 2189. Contents of petition.

The petition must be in writing; it must be signed by the insolvent, and specify his residence, and also, if he is in prison, the county in which he is imprisoned, and the cause of his imprisonment. It must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of this article, for the purpose of being exempted from arrest and imprisonment, as prescribed therein; and it must pray, that upon his so doing, he may thereafter be exempted from arrest, by reason of a debt, arising upon a contract previously made; and also, if he is im-

 Art. 1. Discharge of Insolvent Debtor. The Petition and Papers.

prisoned, that he may be discharged from his imprisonment. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true in matter of fact.

2 R. S. 28, § 1 (2 Edm. 29); see § 2151.

§ 2190. Petitioner's schedule.

The petitioner must annex to his petition, a schedule, in all respects similar to that required of an insolvent, as prescribed in § 2162 of this act.

§ 2191. [Am'd, 1895.] His affidavit.

An affidavit, in the following form, subscribed and taken by the petitioner, before the county judge, or, in the city of New York, before a justice of the Supreme Court, must be annexed to the schedule :

"I, ———, do swear" (or "affirm," as the case may be,) "that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, at any time, or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view that they or any of them should abstain from opposing my discharge."

An insolvent debtor who has been imprisoned in a civil action for converting moneys to his own use, will, nevertheless, be discharged upon his complying with the provisions of the Code of Civil Procedure, § 2188 *et seq.* It was so held even where the conversion was of a patent and heinous character. The discharge was granted because, in converting the moneys, though the conversion was of a most infamous character, it was not, nevertheless, a disposition of his own property for the future benefit of himself or family. It seems, however, that had he disposed of a portion of his own property to the benefit of himself or family, he will not be discharged though the burden of proof showing a disposition of property is upon the creditor. *In re Caamano*, 8 Civ. Proc. 30. The application of the insolvent debtor for a discharge from imprisonment must be made to one of the officers specified in the statute, it cannot be made to any court. And where the proper officer was not in attendance at court on the return day of the order to show cause, the proceedings cannot be continued by a justice of the Supreme Court not residing in the county where the debtor resides, or is imprisoned; and if the proceedings are so continued they are void. *Matter of Roberts*, 70 N. Y. 7. An order discharging a debtor made by the proper judge is not appealable to the General Term or to the appellate division. *Matter of Roberts*, 70 N. Y. 70.

 Art. 2. Order to Show Cause and Hearing.

The presentation of the petition and schedule of an imprisoned debtor duly verified confers jurisdiction. It is said the order to show cause is an incident, but not necessary to jurisdiction. A notice which apprises the creditors of the debtor's intention to ask that he may assign his estate for the benefit of his creditors, and be discharged from imprisonment, is a proper notice to them to show cause why the prayer of the petition should not be granted. *Matter of Jacobs*, 12 Abb. (N. S.) 273. Three things are necessary to give a judge jurisdiction to discharge a debtor from imprisonment: 1. Power to act on the general subject-matter, that is, authority under the statute. 2. Jurisdiction of the person of the insolvent who must reside or be imprisoned in the county. 3. Jurisdiction of the particular case by proper averments. *Develin v. Cooper*, 84 N. Y. 410. The verified petition is sufficient proof of residence, or proof may be made by affidavit of another than the debtor. Id.

Precedent for Petition.

To the County Court of the County of Ulster :

The petition of Abram Doyle respectfully shows that your petitioner resides at 45 Liberty Street, at the city of Kingston, in the county of Ulster.

That he is an insolvent debtor, and is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of Article II., of title I., of chapter 17, of the Code of Civil Procedure, for the purpose of being exempted from arrest and imprisonment as prescribed therein.

Wherefore, your petitioner prays that upon his so doing, he may thereafter be exempted from arrest by reason of any debt arising upon a contract previously made, and have such other relief as he may be entitled to pursuant to said article.

(Signature.)

(Add verification.)

ARTICLE II.

ORDER TO SHOW CAUSE AND HEARING. §§ 2192, 2193.

§ 2192. Order to show cause.

The petition, and the papers annexed thereto, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why the prayer of the petitioner should not be granted; and directing that the order be published and served, in the manner prescribed in § 2165 of this act, for the publication and service of an order, made as therein prescribed.

Id. §§ 3 and 4, am'd. See §§ 2164, 2165.

Art. 2. Order to Show Cause and Hearing.

§ 2193. Hearing, etc.

The provisions of §§ 2166, 2167, 2168, 2169, 2170, 2172, and 2173 of this act, apply to a special proceeding, taken as prescribed in this article.

Service of a notice without signature, of an order requiring creditors to show cause why a discharge should not be granted, which notice states an order made by another officer than the one before whom the proceedings were pending, was held insufficient, and the defect not cured by discharge. *People v. Gray*, 19 How. 238. An order to show cause before one of the judges of the Court of Common Pleas, in and for the city of New York, naming him, is a sufficient compliance with the statute as to specifying the place of return. *Master of Jacobs*, 12 Abb. (N. S.) 273. Upon an application by an insolvent and imprisoned debtor to be discharged from imprisonment, the notice required by statute was, by the order made, directed to be published in two papers, named, and was required to be given for a certain day, at an hour named. In one of the papers, it was for a different day, three days distant. *Held*, that the officer had no right to grant the discharge. *People v. Daly*, 4 Hun, 641. To confer jurisdiction to grant a discharge, a publication of notice as required by statute is indispensable. *Dieckenhoffer v. Ahlborn*, 2 Abb. N. C. 372.

Order to Show Cause.

At a term of the Ulster County court held at the chambers of the judge in the city of Kingston, Ulster County, N. Y., August 18, 1882 :

Present :—Hon. William Lawton, *County Judge of Ulster County*.

In the Matter of the Application of Abram
Doyle, an Insolvent Debtor, for exemption
from arrest.

On reading and filing the petition of Abram Doyle, an insolvent debtor for exemption from arrest, verified this 20th day of March, 1882, with the schedule and affidavit thereto annexed, of Abram Doyle, verified before the above-named William Lawton, the 16th day of July, 1882, and on motion of William T. Holt, attorney for said petitioner,

Ordered, that all the creditors of said Abram Doyle show cause before this court at a term thereof to be held at the court-house in the city of Kingston on the 23d day of September, 1882, at ten o'clock in the forenoon, why the prayer of the said petitioner, Abram Doyle, should not be granted.

That the petitioner also cause to be served upon each creditor of

Art. 3. Discharge and its Effect.

said Abram Doyle, residing within the United States, whose place of residence is known to him, a copy of this order, either personally at least twenty days before the said 23d day of September, 1882, or by depositing it at least forty days before that day in the postoffice, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

WILLIAM LAWTON,
County Judge of Ulster County.

ARTICLE III.

DISCHARGE AND ITS EFFECT. §§ 2194-2199.

§ 2194. Order directing assignment; assignment pursuant thereto.

An order directing the execution of an assignment must be made by the court where it appears, by the verdict of the jury, or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court, as follows:

1. That the petitioner is unable to pay his debts.
2. That the schedule annexed to his petition is true.
3. That he has not been guilty of any fraud or concealment, in violation of the provisions of this article.
4. That he has, in all things, conformed to the matters required of him by this article.

The provisions of §§ 2175, 2176, and 2177 of this act apply to the order prescribed in this section, and to the assignment made in pursuance thereof, except that the trustee or trustees must be nominated, as well as appointed, by the court.

See, also, §§ 2175, 2176, 2177.

§ 2195. When discharge to be granted; effect thereof.

Upon the production by the petitioner of the certificates of the trustee or trustees, and the county clerk, to the effect prescribed in § 2178 of this act, the court must grant to the petitioner a discharge, declaring that the petitioner is forever thereafter exempted from arrest or imprisonment by reason of any debt due at the time of making the assignment, or contracted before that time, though payable afterwards; or by reason of any liability incurred by him by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange before the execution of the assignment; or in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment, with the exceptions specified in § 2218 of this act. The discharge shall have the effect therein declared as prescribed in this section.

2 R. S. 28, § 10, am'd. See §§ 2177 and 2218; see §§ 29 and 30 of art. 7, R. S., am'd; L. 1859, ch. 2.

§ 2196. Discharge to be recorded, etc.

The provisions of § 2181 of this act apply to the discharge and to the petition and other papers upon which it was granted.

Section 19, art. 7, R. S., am'd by L. 1866, ch. 116 (6 Edm. 701).

§ 2197. Petitioner to be released from imprisonment.

If, at the time when the discharge is granted, the petitioner is imprisoned by virtue

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of an execution against his person issued, or of an order of arrest made in an action or special proceeding founded upon a debt, liability, or judgment as to which he is exempted from arrest or imprisonment, as prescribed in the last section but one, the officer must forthwith release him, on production of the discharge or a certified copy of the record thereof.

Id. § 11, am'd.

§ 2198. Debts not affected, etc.

A debt, demand, judgment, or decree against an insolvent discharged as prescribed in this article is not affected or impaired by the discharge; but it remains valid and effectual against all his property acquired after the execution of the assignment. The lien acquired by or under a judgment or decree upon any property of the insolvent is not affected by the discharge.

Id. § 12.

§ 2199. Discharge, when void.

A discharge granted to an insolvent as prescribed in this article is void in the same cases so far as they are applicable in which a discharge, granted as prescribed in article first of this title, is therein declared to be void; and the validity of such a discharge may be tested in the same manner.

Where a debtor makes an application to be exempt from arrest or imprisonment by reason of any debts arising upon contract previously made, viz., money collected in a fiduciary capacity, and it appears that within one year previous to such application he has given a chattel mortgage to secure an antecedent debt, knowing of his insolvency, it was held that the discharge must be denied. *Matter of Mower*, 1 Law Bull. 39. An insolvent is not entitled to his discharge from an indebtedness which arose from his embezzlement of money, and evidences of debt which came into his possession as clerk in the course of his employment as such, but the mere statement in the petition that the demand arose when he was clerk of the creditors for money which he had in his possession and did not account for, and appropriated to his own use, is not sufficient ground for denying the discharge. *Matter of Pyc*, 10 Abb. 409. The provision only relates to claims on contract. *Grocers' Nat'l Bank v. Clark*, 31 How. 115. Giving preferences to creditors previous to an assignment is no answer to a plea of discharge. *Hayden v. Palmer*, 24 Wend. 364. But to the contrary, the later case of *People v. O'Brien*, 3 Abb. Dec. 552. An insolvent's discharge which stated "that the said insolvent has conformed in all things to those matters required of him by the statute, *held*, to be a sufficient recital of all jurisdictional facts. *Pratt v. Chase*, 29 How. 296. The discharge under the statute applies to judgments in actions for torts as well as on contract, but to have such effect judgment

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must have been entered on the verdict at the time of the discharge. *Hayden v. Palmer*, 24 Wend. 364; *Luther v. Deyo*, 19 id. 629; *Ex parte Thayer*, 4 Cow. 66; *People v. Marine Court*, 3 id. 366; *Grocers' Bank v. Clark*, 31 How. 115. For form of discharge, see form under § 2178. An order to discharge an insolvent debtor must be made by the court. *Hayes v. Bowe*, 65 How. 347. Where the order of discharge contains recitals of all jurisdictional facts it protects the sheriff. *Devlin v. Cooper*, 84 N. Y. 410.

If the insolvent be in prison in any suit or proceeding founded on any contract or liability as to which he is exempted from imprisonment by reason of his discharge, granted under the statute, he must be released on producing his discharge. *Hayden v. Palmer*, 24 Wend. 364.

CHAPTER XI.

DISCHARGE OF AN IMPRISONED DEBTOR FROM IMPRISONMENT.

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ARTICLE I.

WHO MAY BE DISCHARGED AND BY WHAT COURT.

§§ 2200, 2201, 2216, 2217, 2218.

§ 2200. Who may be discharged.

A person imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from the imprisonment, as prescribed in this article. A person who has been admitted to the jail liberties is deemed to be imprisoned, within the meaning of this article.

2 R. S. 31, § 1 (2 Edm. 31), as am'd, L. 1847, ch. 390, § 1.

On justice's transcript, see § 3033.

§ 2201. [Am'd, 1895.] To what court application to be made.

Application for such a discharge must be made by petition, addressed to the court

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from which the execution issued ; or to the county court of the county in which he is imprisoned ; or, if he is imprisoned in the city of New York, to the Supreme Court.

§ 2216. Creditor may notify debtor to apply for discharge.

Where a person has been imprisoned by virtue of an execution, for the space of three months after he was entitled, by the provisions of this article, to apply for a discharge ; and has neither made such an application, nor applied for his discharge under the provisions of article first of this title ; the judgment creditor, by virtue of whose execution he is imprisoned, may serve upon the prisoner a written notice, requiring him to apply for his discharge, according to the provisions of this article.

§ 2217. Effect of failure so to apply.

If the prisoner does not, within thirty days after personal service of such a notice, either present a petition to the proper court, as prescribed in article first of this title, or serve, upon the creditor giving the notice, a copy of a petition and schedule, with a notice of his intention to apply for his discharge, as prescribed in this article ; or if, after such a presentation or service, he does not diligently proceed thereupon to a decision, he shall be forever barred from obtaining his discharge under the provisions of this article, or of article first of this title.

§ 2218. Debtor to United States etc., not to be discharged.

Neither of the following named persons shall be discharged from imprisonment, under the provisions of this article :

1. A person owing a debt or duty to the United States.
2. A person owing a debt or duty to the State, for taxes or for money received or collected by any person, as a public officer or in a fiduciary capacity, or a cause of action specified in § 1969 of this act, or a judgment recovered upon such a cause of action.

An infant is entitled to his discharge from imprisonment on complying with the terms of the statute. The prisoner's act in making an assignment will be regarded as valid notwithstanding his infancy. *People v. Mullin*, 25 Wend. 698. A prisoner will not be discharged where he is imprisoned for non-payment of a fine imposed for a contempt of court for the non-performance of some act or duty which it is within his power to perform. *Spaulding v. People*, 7 Hill, 301, affirmed, 10 Paige, 301 ; *Van Wessel v. Van Wessel*, 3 id. 38 ; *Patrick v. Warner*, 4 id. 398. A person committed for non-payment of alimony is entitled to his discharge. *People v. Cowles*, 4 Keyes, 38. But a prisoner will not be discharged who is in custody of the sheriff under an attachment to bring him into court to answer interrogatories in a proceeding for contempt. Such a discharge is premature till after conviction. *Jackson v. Smith*, 5 Johns. 115 ; *Bissell v. Kip*, id. 89. In *Patrick v. Warner*, 4 Paige, 397, it is questioned whether a person imprisoned for costs of a proceeding, as for a contempt to enforce a civil remedy, is entitled to his discharge. If the judgment exceeds \$500, and the defendant has been im-

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prisoned less than three months, a discharge will be void if granted. *Browne v. Bradley*, 5 Abb. 141; *Matter of Rosenberg*, 10 Abb. (N. S.) 450; *Dusart v. Delacroix*, 1 Abb. (N. S.) 409, n. It was held under the former statute, that a person entitled to the jail limits was entitled to apply for a discharge as well as one in close custody. *Holmes v. Lansing*, 3 Johns. Cas. 73; *Peters v. Henry*, 6 Johns. 121; *Coman v. Storm*, 26 How. 84. Although it was also held to the contrary, in *Bylandt v. Comstock*, 25 How. 429, the language of the present section determines the question, overruling the authorities to the contrary, it having been drafted by the codifiers with that view. The object of the statute is the discharge of honest debtors who make an honest and full surrender of all their property for their creditors. *Matter of Brady*, 69 N. Y. 215. Though the petition be addressed to the county judge, instead of to the court, the validity of the discharge is not affected, as it is a mere irregularity and not a jurisdictional defect. *Borthwick v. Howe*, 27 Hun, 505.

An application for the discharge of an insolvent debtor may be made in the court out of which the execution issued. *Matter of Irving*, 3 How. (N. S.) 236. While the form of the petition is not prescribed by the statute, enough must appear upon the face of it to give the officer jurisdiction. All the facts to entitle the applicant to a discharge must appear, more particularly all jurisdictional facts. *Browne v. Bradley*, 5 Abb. 141; *People v. Brooks*, 40 How. 165. Where the petition showed that the judgment on which the petitioner was taken in execution exceeded \$600, but did not also show that he had been imprisoned three months, it was held on motion by the plaintiff to issue a new execution against the body of the debtor, that the petition was defective, and the discharge granted upon it void for want of jurisdiction. *People v. Bancker*, 5 N. Y. 106. The omission of an account of the debtor's real and personal estate as it existed at the time of the arrest is not supplied by allegations in the petition, that prior to the rendition of the judgment the debtor was adjudged a bankrupt, and an assignee in bankruptcy appointed. *Bulymore v. Cooper*, 46 N. Y. 236. The mere fact that his imprisonment under the execution and order of arrest has continued for three months is not sufficient. *Dusart v. Delacroix*, 1 Abb. (N. S.) 409. Proof that the insolvent resided or was imprisoned in the

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county where the application was made was required as jurisdictional, under the Revised Statutes. *People v. Machado*, 14 Abb. 460. An insolvent debtor, whose petition for a discharge has been refused because his proceedings are adjudged to be not just and fair, in that he failed to include in his petition an account of some of his property, cannot be permitted to present a new petition, including such property, and stating no new facts to explain or justify his acts in his former proceedings, but he will be left to an application to reopen the former proceeding, upon proof of the good faith of the matters charged upon him in that proceeding. *Matter of Thomas*, 10 Abb. (N. S.) 114. A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment if it alleges that he is confined in the county jail by virtue of an execution against his person, issued in a civil action, brought by a person therein named. *Ex parte Chappell*, 23 Hun, 179. The application was required to be to the court under the Revised Statutes. *Mathews' Case*, 14 Abb. 115; *Matter of Walker*, 2 Duer, 655.

ARTICLE II.

PETITION AND PAPERS. §§ 2202-2207.

§ 2202. When petition may be presented.

A person so imprisoned may apply for such a discharge, at any time; unless the sum, or, where he is imprisoned by virtue of two or more executions, the aggregate of the sums, for which he is imprisoned, exceeds five hundred dollars; in which case, he cannot present such a petition, until he has been imprisoned, by virtue of the execution or executions, for at least three months.

In connection with above section see § 111, Code Civ. Pro.

§ 2203. Contents of petition; schedule.

The petition must be in writing; it must be signed by the petitioner; and it must state the cause of his imprisonment, by setting forth a copy, or the substance, of the execution, or, if there are two or more executions, of each of them. The petitioner must annex thereto, and present therewith, a schedule, containing a just and true account of all his property, and of all charges affecting the same, as the property and charges existed at the time when he was first imprisoned, and also as they exist at the time when the petition is prepared; together with a just and true account of all deeds, securities, books, vouchers, and papers, relating to the property, and to the charges thereupon.

2 R. S. 31, § 4, am'd.

§ 2204. Affidavit of petitioner.

An affidavit, in the following form, subscribed and taken by the petitioner, on the day of the presentation of the petition, must be annexed to the petition and schedule:

"I, ———, do swear" (or "affirm," as the case may be), "that the matters of fact,

 Art. 2. Petition and Papers.

stated in the petition and schedule hereto annexed, are, in all respects, just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud any of my creditors."

Id. § 5, am'd. See §§ 2163 and 2191.

§ 2205. Notice to creditors.

At least fourteen days before the petition is presented, the petitioner must serve, upon the creditor in each execution, by virtue of which he is imprisoned, a copy of the petition and of the schedule; together with a written notice of the time when, and place where, they will be presented. If, by reason of changes occurring after the service, it is necessary, before presenting the petition and schedule, to correct any statement contained in the schedule, the correction may be made by a supplemental schedule, a copy of which need not be served, unless the court so directs.

Id. § 3, am'd.

§ 2206. Id. ; when service cannot be made.

The papers, specified in the last section, may be served, either upon the creditor or his representative, or upon the attorney whose name is subscribed to the execution; and, in either case, in the manner prescribed in this act for the service of a paper upon an attorney, in an action in the Supreme Court. Where it is made to appear by affidavit, to the satisfaction of the court, that service cannot, with due diligence, be so made within the State, upon either, the court may make an order, prescribing the mode of service or directing the publication of a notice in lieu of service, in such a manner and for such a length of time, as it thinks proper; and thereupon, it may direct an adjournment of the hearing to such a time as it thinks proper.

Id. part of § 3.

§. 2207. Id. ; when State a creditor.

Where the State is a creditor, the papers must be served upon the attorney-general, who must represent the State in the proceedings.

A discharge is void where the papers fail to show the debtor has been imprisoned for three months. *Browne v. Bradley*, 5 Abb. 141. An application for a discharge must show that the arrest is for over \$500, and that he has been imprisoned more than three months. An objection to the jurisdiction on this ground may be taken at any time. *Matter of Rosenberg*, 10 Abb. (N. S.) 450. Where the aggregate of the sums for which the debtor is imprisoned exceed five hundred dollars, the petition must allege that the debtor has been imprisoned three months, as such fact is jurisdictional. *Kappel v. Yotz*, Dly. Rgstr., December 26, 1883.

The limitation of time during which the debtor may be imprisoned on civil process applies only to the time he is imprisoned on the final process, and does not include a prior imprisonment on another arrest. *In re Coyne*, 18 Civ. Pro. 397, 13 Supp.

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797. It is essential to the jurisdiction of the court in proceedings for the discharge of an imprisoned debtor, that the demand upon which the application is founded should conform with exactness to the provisions of the statute; thus facts, not mere conclusions from facts, must be set forth in the petition in order that the court may determine whether the schedule is correct and whether the petitioner's proceedings are just and fair; therefore when these facts are not presented the application of the petitioner will be denied, but, it seems, with leave to renew on sufficient papers. *Matter of Patton*, 7 Misc. 467, 58 St. Rep. 512, 23 Civ. Pro. 331. A judgment creditor, by appearing before a county judge in a proceeding for the discharge of the judgment debtor from imprisonment, waives the objection that the affidavit of the petitioner is not made on the day of the presentation thereof, by not objecting thereto. *Schaefer v. Risley*, 114 N. Y. 23, 22 St. Rep. 168. It seems though the demand upon which judgment was recovered is a debt fraudulently contracted or a claim for damages for deceit, the discharge of the debtor from imprisonment under an execution cannot be denied unless it is shown that he has at some time made away with his property with intent to benefit himself or his family in the future, or with intent to injure and defraud the creditors, and it seems therefore that a judgment debtor imprisoned on an execution on judgment for money obtained by fraud cannot be discharged from imprisonment when he has used such money in maintaining himself and family, with a knowledge that his creditors will thereby be losers. In this case he is deemed to have disposed of the money with intent to defraud his creditors. *In re Lowell*, 8 Civ. Pro. 7.

The statute is imperative that the papers presented to the court shall conform with exactness to its provisions. It is requisite to jurisdiction of a petition for a discharge that an account of the real and personal estate be given as it existed at the time of preparing the petition. This is to prevent payments and transfers of property to other creditors than the execution creditor during the time of the imprisonment. It must contain an account, as required by statute. A statement that the petitioner, prior to the rendition of the judgment on which he was arrested, was declared bankrupt, and an assignee of all his property appointed, in whom title has vested, does not supply the defect of an account of his property at the time he was arrested.

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No account or statement of creditors is required, since no creditors are interested in the proceeding except such as have the debtor on execution. *Bulymore v. Cooper*, 46 N. Y. 236; *People v. Bancker*, 5 id. 106; *People v. Brooks*, 40 How. 165; *Hall v. Kellogg*, 12 N. Y. 325.

Form of Petition.

To the Supreme Court of the State of New York :

The petition of Stephen Harp, of the town of Hurley, county of Ulster, N. Y., respectfully shows to the court that the petitioner is a prisoner confined in the jail of the county of Ulster, on an execution against the person, issued out of this court, in a civil action, wherein Charles French is plaintiff and your petitioner is defendant ; and in which action judgment was rendered against your petitioner for the sum of \$854.35, on the 23d day of June, 1884. That the said sum of \$854.35 is now due and unpaid on said execution, and that your petitioner has been imprisoned on said execution for more than three months.

And your petitioner further shows that hereto annexed, and marked as schedules "A" and "B," is a just and true account of all his estate, real and personal, in law and equity, and of all charges affecting the same, as the property and charges existed at the time when he was first imprisoned and also as such property and charges existed at the time of preparing the petition, together with a just and true account of all deeds, securities, books, and writings whatsoever relating to the said estate and the charges thereon, with the names and places of abode of the witnesses to such deeds, securities, and writings.

Your petitioner therefore prays the order of this court, directing the sheriff of said county to bring your petitioner into this court on a day assigned for that purpose, that your petitioner may be discharged from his said imprisonment on his compliance with the provisions of the Code of Civil Procedure ; and that your petitioner may have such further or other relief as he may be entitled to under the provisions of the statute authorizing debtors imprisoned on execution in civil causes to be discharged from imprisonment.

Dated January 1, 1885.

(Signature.)

(Verification as required by § 2204.)

The petitioner's schedules must set forth facts and not mere conclusions. Thus the following statement in the schedules was held to be insufficient under the statute: "A just and true statement of all my property and charges affecting it as it existed at the time of my petition, was prepared, to wit, March 6, 1894. There has been no substantial change in the condition of my property since I was first imprisoned." The court says: "Such is not the just and true account contemplated by the statute.

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The facts, not the mere conclusion from facts, must be set forth in order that the court may determine whether the schedule is correct, and whether the petitioner's proceedings are just and fair." *Matter of Paton*, 7 Misc. 467, 58 St. Rep. 512, 23 Civ. Pro. 331.

A discharge is not defective, although the petition asked for a discharge in an action, "in which one Goodwin was plaintiff, and Munger and others, defendants," thereby naming only one of two plaintiffs, and but one of the defendants arrested. *Goodwin v. Griffis*, 88 N. Y. 629. The court does not obtain jurisdiction to discharge the prisoner unless he verifies the petition at the time he presents it, and the affidavit is a prerequisite to jurisdiction. *Browne v. Bradley*, 5 Abb. 141; *Bullymore v. Cooper*, 2 Lans. 71, affirmed, 46 N. Y. 236; see *Hillyer v. Rosenbery*, 11 Abb. (N. S.) 402. The affidavit under the Revised Statutes was not required to be indorsed and sworn to in presence of the court, but at time of its presentation, it must have been sworn to by the applicant. *Richmond v. Praim*, 24 Hun, 578. It is held in *Schaeffer v. Risely*, 6 State Rep. 417, that the affidavit must be made on the day of the presentation of the petition and not previously, and it is intimated that no copy of affidavit need be served. This necessarily follows if this rule is strictly followed, and it seems to be jurisdictional. Under the requirement of this section as to the affidavit, it is held, in *Matter of Brown*, 39 Hun, 27, that if it be shown that the creditor was in any way defrauded or injured by the transaction alleged to be fraudulent, proof thereof may be given whether such transaction preceded or followed the recovery of the judgment by such creditor, or even the inception of the cause of action on which such judgment was recovered. Though § 2204 requires the petition to be verified upon the day of the presentation thereof, yet, an omission to do so, though a jurisdictional defect, is waived, if the attorney for the execution creditor appears without objection on that day, and bases his defence upon the merits only. *Shaffer v. Riseley*, 114 N. Y. 23, 22 St. Rep. 168, 16 Civ. Pro. 369. Fraud in the disposition of his property by the debtor will bar discharge, though fraud in contracting the debt is not such a bar. *Matter of Pearce*, 29 Hun, 270. *Contra*, *Price v. Orcutt*, Dly. Rgstr., May 26, 1884. As § 2204 requires that the affidavit of the petitioner must be taken on the day of the presentation of the petition, a

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county judge has no jurisdiction, if the affidavit was taken previously to that date. *Shaffer v. Riseley*, 44 Hun, 6. But see same case on appeal 114 N. Y. 23, 22 St. Rep. 168, 16 Civ. Pro. 369, *supra*. See *Sweet v. Norris*, 19 Abb. N. C. 152, 12 Civ. Pro. 175, for the statement by the court of the provisions of this article. Notice of application was for a term to be held at the court-house; the order was at a term of court at office of county judge. *Held*, that it was to be presumed that such office was at the court-house, and that the order was made at a regular term of the court. *Goodwin v. Griffis*, 88 N. Y. 630. The same case holds that where one of plaintiffs signed an admission of service and he was sole owner of judgment, it was sufficient.

Form of Notice of Motion.

In the Matter of the Application of Stephen Harp, an Insolvent Debtor, to be discharged from imprisonment.

To HENRY G. WILLIAMS :

SIR—Please take notice, that I shall present to the Supreme Court, at the next Special Term thereof, to be held at the court-house at Kingston, in the said county of Ulster, on the 27th day of January, 1885, at ten o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard, the petition together with the account annexed thereto, with copies whereof you are herewith served, and that I shall then and there apply to the said court that the prayer of said petition be granted.

W. S. FREDENBURGH,

(Dated.)

Attorney for Stephen Harp.

ARTICLE III.

PROCEEDINGS, ASSIGNMENT, AND DISCHARGE. §§ 2208–2214.

§ 2208. Proceedings on presentation of petition.

Upon the presentation of the petition, schedule, and affidavit, with due proof of service or publication, as prescribed in the last three sections, the court must make an order, directing the petitioner to be brought before it, on a day designated therein; and on that day, or on such other days as it appoints, the court must, in a summary way, hear the allegations and proofs of the parties. If the court is satisfied that the petition and schedule are correct, and that the petitioner's proceedings are just and fair, it must make an order, directing the petitioner to execute to one or more trustees, designated in the order, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution; or of so much thereof as is sufficient to satisfy the execution or executions, by virtue of which he is imprisoned.

Art. 6, § 6, R. S., am'd.

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§ 2209. Adjournment.

Upon sufficient cause being shown by a creditor, the court may, from time to time, adjourn the hearing; but not to a day later than three months after the presentation of the petition.

Id. § 7, am'd.

§ 2210. Proceedings on adjourned day.

An objection to a matter of form shall not be received upon an adjourned day; and, unless the opposing creditor satisfies the court that the proceedings on the part of the petitioner are not just and fair, the court must direct an assignment, as prescribed in the last section but one, and must grant a discharge, as prescribed in the following sections of this article.

Id. § 8.

§ 2211. Assignment; effect thereof.

The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county where the petitioner is imprisoned. Where it appears, from the schedule or otherwise, that real property will pass thereby, the assignment must also be recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated. The assignment vests in the trustee or trustees, for the benefit of the judgment creditors in the executions, by virtue of which the petitioner is imprisoned, all the estate, right, title, and interest of the petitioner in and to the property, so directed to be assigned.

Id. part of § 9; also part of § 20, art. 7; see § 2177.

§ 2212. Discharge, when to be granted.

Upon the production, by the petitioner, of satisfactory evidence, that the petitioner has actually delivered to the trustee or trustees all the property so directed to be assigned, which is capable of delivery; or upon the petitioner's giving security, approved by the court, for the future delivery thereof; the court must make an order, discharging the petitioner from imprisonment, by virtue of each execution, specified in his petition. The sheriff, upon being served with a certified copy of the order, must discharge the petitioner as directed therein, without any detention on account of fees.

Id. §§ 10 and 11. See § 2200.

§ 2213. Petitioner's property still liable.

Notwithstanding such a discharge, the judgment creditor in the execution has the same remedies, against the property of the petitioner, for any sum due upon his judgment, which he had before the execution was issued; but the petitioner shall not, except as is otherwise specially prescribed in the next section, be again imprisoned by virtue of an execution upon the same judgment, or arrested in an action thereupon.

Art. 6, § 12, R. S., am'd.

§ 2214. When creditor may issue new execution against person.

If the petitioner is convicted of perjury, committed in any of the proceedings upon his petition, any judgment creditor, by virtue of whose execution he was imprisoned, may issue a new execution against his person.

A judgment debtor is not entitled to his discharge where he has disposed of his property with intent to defraud the creditor at whose suit he is imprisoned. *Coffin v. Gourlay*, 9 Week. Dig. 490; S. C. 20 Hun, 408. It is enough to show that the pro-

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ceedings on the part of the debtor were not "just and fair" if the creditor establishes upon the hearing that the debtor has disposed of or made over any part of his property with intent to injure or defraud any of his creditors, although such act was committed before the commencement of the action in which he is imprisoned, provided they are shown to be so far connected with the action as to be grounds for the order on which his imprisonment was based. The fraudulent disposition need not have been made with a view to his discharge. *Matter of Brady*, 69 N. Y. 215, affirmed, 8 Hun, 437. But what is required is that the proceedings of the debtor have been just and fair. With respect to the matters that he is required to swear to in the affidavit, there is nothing in the statute that would authorize holding that a debtor cannot be discharged because he has made a false and fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner for the injury thus sustained. *Matter of Fowler*, 59 How. 148.

Still a discharge will be refused on the ground that a fraudulent mortgage of property was made before the commencement of the action, but in view of its commencement, though in no way connected with the subject of the action. *Gaul v. Clark*, 1 Week. Dig. 209. It was held that the "proceedings" referred to might be transactions prior to the application. *Matter of Watson*, 2 E. D. S. 429. Although the Marine Court seems to have held a different rule in *Sparks v. Andrews*, 7 Week. Dig. 276. See, also, *People v. White*, 14 How. 498, and *Matter of Finck*, 59 id. 145. In *Matter of Fowler*, 59 How. 148, it is held that the proceedings are by this section required to be just and fair in respect to the matters he is required to swear to in the petition, and that the affidavit means any disposition of his property made with intent to defraud existing creditors. In *Suydam v. Belknap*, 20 Hun, 87, the *Case of Brady*, 69 N. Y. 215, is distinguished. A debtor's proceedings are not just and fair if he has procured by fraud property from the execution creditor, or aided others in so doing, but if he was innocent of the fraud, though legally liable for the debt, he may be discharged. It is not necessary, however, that he or his family should have been benefited, to bar a discharge, if the creditor was defrauded by his act. *Matter of Roberts*, 59 How. 136; *Matter of Finck*, id. 143; *Matter of*

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Tomkins, 3 Law Bull. 8. Where a defaulter could not account for property misappropriated, except as to a portion conveyed away, and not specified in his inventory, *held*, he could not have the benefit of the act. *People v. White*, 14 How. 498. Where the petitioner, after imprisonment, filed a voluntary petition in bankruptcy, and, by virtue of it, assigned all his property to the assignee in bankruptcy, and then filed his petition for a discharge under this act, *held*, that such disposition of his property was a fraud on the act, and a ground for refusing the discharge. *People v. Brooks*, 40 How. 165; *Spear v. Wardwell*, 1 N. Y. 144; *Hall v. Kellogg*, 12 id. 325. But where the debtor was charged in execution, after petition filed in bankruptcy, it was held to be a valid disposition of his property, and no bar to his discharge. A creditor cannot contest the discharge who is in no way injured or defrauded. *Matter of Brady*, 69 N. Y. 215. Only existing creditors at the time can complain that the debtor at one time conveyed all his property with intent to defraud his creditors. The fraud which the bankrupt must be guilty of is not the fraud in contracting the debt or liability, but fraud in the subsequent disposition of his property to evade such liability. *In re Pearce*, 29 Hun, 270. The fact that the defendant converted funds received in a fiduciary capacity does not prevent his discharge, as it was not his own money. *Suydam v. Belknap*, 20 Hun, 87. But it was also held in *Matter of Tomkins*, 3 Law Bull. 8, that where a debtor seeks discharge from imprisonment on a judgment for money received in a fiduciary capacity, he must show what he has done with the money. Personal participation by the petitioner in a fraud perpetrated by a firm of which he was a member must be shown to justify the court in denying a discharge. A judgment that the firm has been guilty of a fraudulent disposition of its property does not necessarily preclude his discharge as one of the partners. *Matter of Benson*, 11 Week. Dig. 394. The General Term will not review the determination of the county court, whether the schedules of the debtor are just and fair. *Richmond v. Prain*, 24 Hun, 578. A debtor has a right to prefer any creditor, or defeat a preference to any creditor by a general assignment or other preference. It is sufficient if the intent be to pay honest debts. *In re Pearce*, 29 Hun, 270; *Roswog v. Seymour*, 7 Robt. 429; *Corning v. White*, 2 Paige, 567. It is said a debtor is not entitled to his discharge if it appears he

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has been in the enjoyment of an income, and expended it in the support of his family without any effort to pay the judgment, and the circumstances are such that he might have set apart a portion of his income to apply on the judgment, for omitting to do so is not "just and fair." *Matter of Donoghue*, 17 Abb. N. C. 277. A debtor cannot be discharged who has disposed of his property to defraud creditors, whether it was before or after action in which he was arrested, but, to prevent a discharge, there must have been an intent to defraud existing creditors, of whom the creditor contesting the discharge must have been one. *In re Haight*, 11 Civ. Pro. 227. A judgment debtor imprisoned under a judgment for money obtained by him by fraud, who has used such money in maintaining himself and family, is deemed to have disposed of such money with intent to defraud the creditor, and cannot be discharged under § 2200, etc. Following *In re Finck*, 59 How. 145; *In re Roberts*, id. 136; *Matter of Lowell*, 8 Civ. Pro. 5.

Where the insolvent, just prior to a general assignment by his firm, permitted his wife to withdraw all his ready money in the firm on account of indebtedness to her, had collected firm moneys and applied to his own use, etc., it was held that his proceedings had not been just and fair, and his application for a discharge denied. *In re Howes*, 9 Civ. Pro. 17. In an action against a sheriff for an escape, the defence was set up that the imprisoned debtor had been legally discharged, pursuant to the directions contained in Code of Civil Procedure, § 2212. *Held*, that the fact that the petition for the discharge was in writing, and that a schedule was annexed as required by Code of Civil Procedure, § 2203, being shown upon the trial, supplied the want of those allegations in the order of discharge. *Held*, that the affidavit required to be annexed to the petition and schedule by Code of Civil Procedure, § 2204, must be subscribed and taken, as therein provided by the petitioner on the day of the presentation of the petition. *Held*, that an order for the discharge of an imprisoned debtor which did not recite the fact of an affidavit made and annexed, pursuant to the provisions of Code of Civil Procedure, § 2204, when, in fact, such affidavit was not made on the day therein specified, did not protect the officer making the discharge as directed. *Schaffer v. Risely*, 6 State Rep. 417.

An objection to the discharge of the debtor on the ground that he has fraudulently transferred his property, can only be raised

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by those who were creditors at the time of such transfer. *Matter of Pearce*, 29 Hun, 270. Where the petitioner fails, satisfactorily, to account for his disposition of a sum of money received by him, the discharge will be denied, or if the court is satisfied that the debtor has disposed of his property with an intent to defraud his creditors, or if it appear that the petition and schedules are not correct, the discharge will be denied. *Matter of Haight*, 11 Civ. Pro. 227. But the fact that the debtor conveyed property to his wife, before the existence of the debts owned by the opposing creditors, will not prevent a discharge. *Matter of Haight*, 11 Civ. Pro. 227. It has been held that if the judgment debtor has knowingly expended money obtained by fraud, he is not entitled to a discharge, nor can he be discharged if he has invested moneys subsequently acquired in the name of his wife, and in fraud of creditors. *Matter of Lowell*, 13 Daly, 306, 2 How. Pr. (N. S.) 285, 8 Civ. Pro. 5.

And it has been held that the debtor's proceedings have not been just and fair, where, on the eve of the assignment of the firm to which he belonged, he had collected a sum of money which he retained individually and failed to account for, and where he had allowed his wife, a creditor of the firm, to draw all the ready money of the firm before the failure, and where he had transferred an indebtedness due the firm from his daughter, to his wife's credit, thereby extinguishing the debt. *Matter of Howes*, 9 Civ. Pro. 17. A discharge has also been denied where it appeared that the debtor had drawn his entire bank account immediately after an adverse verdict, and where he was unable to account for the same. *Barck v. Senn*, Dly. Rgstr., May 31st, 1883. It has been held, however, that the debtor will be discharged upon complying with the provisions of the statute and assigning and delivering his property, even though guilty of conversion in a fiduciary capacity, where it does not appear that he has disposed of his own property to the benefit of himself or family with intent to defraud creditors. *Matter of Caamano*, 8 Civ. Pro. 29; 2 How. Pr., N. S., 240. See, also, *Warshauer v. Webb*, 10 Civ. Pro. 169, 18 Abb. N. C. 232; *People ex rel. Rodding v. Grant*, 10 Civ. Pro. 174, note. *Contra*, *People ex rel. Lust v. Grant*, 10 Civ. Pro. 158. In proceedings by *certiorari* and *habeas corpus* to procure the discharge of one imprisoned, the discharge was denied where the defendant was imprisoned in

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an action brought against him by his wife for separation, and where he was a non-resident of the State, and the judgment in such action would require the payment of alimony ; failure to do which would be punishable as a contempt. *People ex rel. Cohn v. Grant*, 11 Civ. Pro. 57, 18 Abb. N. C. 231 ; compare *Dalon v. Knapp*, 11 Civ. Pro. 59. It has been held that in proceedings for a discharge of an imprisoned judgment debtor, under the Code provisions, § 2200 *et seq.*, that it is error for the county court to exclude evidence offered relating to transactions prior to the date of the judgment, in determining whether the petitioner's proceedings have been just and fair. *Matter of Brown*, 39 Hun, 27. In this proceeding there is a presumption of fairness in favor of the petitioner's course of action, and where the petitioner was a member of the firm, it is not enough to show that the firm was guilty of the fraud, in order to prevent his discharge, but it must be shown that the petitioner personally participated in such fraud. *Matter of Benson*, 10 Daly, 166. Where it appears that an imprisoned debtor, although owning no property not exempt from execution, works for his wife without wages upon a farm owned by her, and has good credit, a discharge will be refused, on the ground that his proceedings are not just and fair. *In re Boyce* 11 Supp. 624, 19 Civ. Pro. 23.

The Court of Appeals will not interfere with a finding of fact as to the intent with which a debtor disposed of his property. *Matter of Sedgwick*, 12 Week. Dig. 270. An adjudication on the merits is held a bar to future application. *Matter of Roberts*, 10 Hun, 253, 59 How. 136, reversed 70 N. Y. 5, but not on point discussed below. In *Matter of Brady*, 69 N. Y. 215, a proceeding under the Revised Statutes, it was held that the right to review a Special Term decision, in a matter affecting a substantial right, being general and fundamental, will be deemed to exist unless the intent to destroy it is expressed with great clearness. Where the petitioners failed to appear on the day to which the hearing had been adjourned, and the proceedings were dismissed with leave to come in on terms, and the petitioner moved to open the default, it was held that the court had lost jurisdiction by the omission to adjourn the proceeding on the day assigned for the hearing. *Bylandt v. Comstock*, 25 How. 429. And when the proceedings were not adjourned to the next term, the adjournment of the court without day put

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an end to them. *People v. Brooks*, 40 How. 165. The design of § 2212 is to leave it to the sound discretion of the court whether to require any security, and, if any, then to fix the form of the security and the amount according to the circumstances of each particular case. *Roswog v. Seymour*, 7 Robt. 429. The assignment must include all property which the debtor has at the time when it is ordered and made, and not merely such as he had at the time of filing the petition. *Borthwick v. Howe*, 27 Hun, 505.

It was held in *Re Von Schoening*, 1 Law Bull. 4, that the affidavit of the assignee that the property of the debtor had been delivered to him amounts to a certificate of that fact, and is sufficient. If the order is relied upon without proof *aliunde* of the facts needful for jurisdiction, the recitals should be full, but otherwise no recitals are absolutely necessary. It is valid if the facts exist which render it so, whether recited or not, but for the protection of the sheriff in discharging the prisoner it should contain *prima facie* evidence of regularity of the proceedings, and show sufficient jurisdictional facts. *Bullymore v. Cooper*, 46 N. Y. 236; *Bennett v. Burch*, 1 Den. 141; *Devlin v. Cooper*, 84 N. Y. 410. If the order for discharge omits the recital of a material fact, the fact may be shown *aliunde*. *Goodwin v. Griffis*, 88 N. Y. 630. The sheriff should discharge the prisoner although the order for the discharge does not state that the petition was in writing signed by the party with the schedule annexed; the sheriff will be protected in an action for an escape by showing that these facts existed. *Schaffer v. Riseley*, 44 Hun, 6. The discharge of the imprisoned debtor pursuant to this title of the Code does not discharge his sureties from liability upon their undertaking. *Prusia v. Brown*, 45 Hun, 81. The court must have satisfactory evidence that the assignment has been actually made, and the property covered by the assignment actually delivered; and the assignment must include, not only the property that the judgment debtor had at the time of signing his petition, but also all property in his possession at the time when the order for the assignment is made. *Borthwick v. Howe*, 27 Hun, 505.

Art. 4. Powers and Duties of Trustees.

ARTICLE IV.

POWERS AND DUTIES OF TRUSTEES. § 2215.

§ 2215. Powers and duties of trustees.

The trustee must collect the demands, and sell the other property assigned to him. He must apply the proceeds thereof, after deducting his commissions and expenses allowed by law, as follows :

1. To the payment of the jail fees, upon the imprisonment and discharge of the petitioner.
2. If any surplus remains, to the payment of the creditors, by virtue of whose executions the petitioner was imprisoned, when he presented his petition ; or, if there is not enough to pay them in full, to the payment to each, of a proportionate part of the sum due upon his execution.
3. If any surplus remains, he must pay it over to the petitioner, or his executor or administrator.

Personal service upon a creditor, or his attorney, of written notice, of the time and place of making a distribution, as prescribed in subdivision second of this section, has the same effect as publishing a notice thereof, in a case prescribed by law.

The Revised Statutes, by Article VIII. of the same title defining the practice as to insolvents, and for which the preceding sections are substituted, defined the powers and duties of trustees of insolvents. The Code has re-enacted, substantially, all the statutes to which Article VIII. refers, except the article as to attachments. This omission renders obsolete some portions of Article VIII., but its principal features remain operative and must govern in determining the authority of trustees under the insolvent's practice as it now stands. It first gives the powers conferred generally on trustees, by the court, for the benefit of creditors, and then defines their authority over the assigned estate and method of administration with great minuteness and particularity, and follows with details relating to the distribution of the fund and manner in which trustees may be discharged from their trust. Chapter 158 of Laws of 1846 treats of the same subject-matter. The statute has been judiciously construed in a number of cases. As to the power of the court to compel trustees to appoint referees, under § 14, it is held a non-resident debtor may have mandamus for that purpose. *Titus v. Kent*, 1 How. 80. But such mandamus will be denied after the debtor has, by stipulation, adjourned the hearing, and after evidence has been gone into before the trustees. *Matter of Belknap*, 2 How. 200. If the trustees err in the application of legal principles, the court will correct the error, but on a question of fact their decision must be treated as a verdict. *Matter of Negas*, 7 Wend. 499.

 Art. 4. Powers and Duties of Trustees.

Every creditor who was a creditor at the time of the assignment and whose demand is existing at the time of the distribution, has a right to exhibit his claim to the trustees, and upon having it allowed, to share in the distribution. *Matter of Coates*, 12 How. 344. A debt due from the debtor for money received by him as executor, but before he qualified, is due from him in his official capacity. *Matter of Faulkner*, 7 Hill, 181. The trustees are entitled to commissions on the amount received by a creditor by a compromise with the debtor, though it did not come to the trustees' hands. *Matter of Bunch*, 12 Wend. 280. A trustee may maintain an action of conversion of personal property of the debtor committed before his appointment. *Gillett v. Fairchild*, 4 Den. 80. To obtain an examination under § 12, of the debtor, his wife, or others, believed to secrete property, legal proof of concealment is not necessary, the proof may be on information and belief. *Noble v. Holliday*, 1 N. Y. 330. The ownership of stock cannot be summarily tried. *Matter of Denny*, 2 Hill, 220. The right of set-off is not confined to liquidated debts, but extends to all mutual credits between the original parties. *Holbrook v. Receivers*, 6 Paige, 220; *Jones v. Robinson*, 26 Barb. 310. The statute is in practice, but little used, since, as is known to every practitioner, it is very rare that one taking proceedings to which it is applicable has any assets which pass to the assignee. Under the amendment to § 111, Code of Civil Procedure, providing that no person shall be imprisoned for more than three months, and that, at the expiration of that period, the sheriff must release the prisoner, the occasion for bringing into practice the insolvent acts will doubtless be fewer than before, and these and the provisions of the Code on the subject be less resorted to than heretofore. As, however, these matters stand on the statute books, and may be brought into requisition, it has been deemed better to treat of the matters in such a way that, if occasion requires, a complete system will be found at hand. See Revised Statutes as to powers, duties, and liabilities of assignees and trustees of insolvent debtors, being Art. VIII. of part 2, chap. 5, title 1, Revised Statutes, printed in full in Fiero, on Special Actions, vol. 2, p. 1096. Bliss (Code, vol. 3, p. 2604) calls attention to the fact that "some sections of it (the statute) are, however, practically superseded by the fact that the first article of the title being that as to attachments is repealed

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and not re-enacted except as incorporated in the general provisions as to attachment under the Code. Art. IV. of R. S. is also repealed and not re-enacted, except as covered by §§ 2216-2217." The statute is there printed in full, as is also chap. 158, § 1846, relative to filling vacancy in office of assignee or trustee.

CHAPTER XII.

CARE OF THE PROPERTY OF A PERSON CONFINED FOR CRIME.

SECTIONS OF THE CODE AND WHERE FOUND IN THIS CHAPTER.

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§ 2219. [Am'd, 1895.] When and to what court application to be made.

Where a person is imprisoned in a State prison, for a term less than for life; or in a penitentiary or county jail, for a criminal offence, for a longer term than one year; one or more trustees, to take charge of his property, may be appointed, as prescribed in this article, by the county court of the county, or the Supreme Court in the judicial district, where he resided at the time of his imprisonment; or, if he was not then a resident of the State, where he is imprisoned.

2 R. S. 15, art. 1, § 1 (2 Edm. 15); L. 1895, ch. 946.

§ 2220. Who may apply.

A petition for such an appointment may be presented by either of the following persons:

1. A creditor of the prisoner.
2. The prisoner's husband, wife, or child.
3. One or more of his next of kin, or, where he owns real property, of his heirs presumptive.
4. A relative whom he is bound to support.
5. Any relative or other person, in behalf of his infant child or children.

Part of §§ 1 and 4.

§ 2221. Creditor must relinquish security.

A creditor of the prisoner, who has a judgment, mortgage, or other security, specified in § 2158 of this act, cannot apply for such an appointment, with respect to the debt so secured, unless he appends to or includes in his petition, the declaration, required by that section from a consenting creditor; which declaration has the same effect as the declaration of a consenting creditor, as therein specified.

Art. 7, R. S. § 11. See § 2158.

§ 2222. Contents of petition.

The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein stated are true, to the best of the petitioner's

Art. 1. Copy of Sentence and Affidavit to be Presented.

knowledge and belief. It must set forth the facts, showing that the applicant is entitled to make the application, and that the application is made to the proper court; the name and residence of each person, who is entitled to make such an application, as prescribed in the last section but one, except the fifth subdivision thereof; and a brief description of the property, real and personal, of the prisoner, and the value thereof. If the applicant is a creditor, and not a resident of the State, he must annex to his petition, the papers specified in § 2161 of this act. If any of the facts, herein required to be set forth, cannot be ascertained by the petitioner, after the exercise of due diligence, that fact must be stated; and the court may, in its discretion, issue a subpoena, requiring any person to attend and testify, respecting any matter, which, in its opinion, ought to be more fully and certainly set forth.

See § 2161.

§ 2223. Copy of sentence and affidavit to be presented.

The petition must be accompanied with a copy of the sentence of conviction of the prisoner, duly certified by the clerk of the court by which he was sentenced under the seal thereof; together with an affidavit of the applicant, stating that the person so convicted is actually imprisoned thereunder.

Art. 2, R. S. § 2, in part.

§ 2224. Proceedings upon presentation of the papers.

Upon the presentation of the papers, the court may, in its discretion, make an order, either appointing one or more fit persons trustees of the property of the prisoner; or requiring all creditors of the prisoner, and all persons interested in his estate, to show cause, at a time and place specified therein, why such an appointment should not be made. In the latter case, the order must direct the manner of service thereof, by publication or otherwise.

Id. part of § 2.

§ 2225. Id.; on return of order to show cause.

Upon the return of an order to show cause, made as prescribed in the last section, proof of the service thereof, as required thereby, must first be made; whereupon the court must hear the allegations and proofs of the creditors and other persons interested in the estate, who appear. Where the prisoner is indebted to any person, the court must appoint one or more trustees, unless the persons interested in the prisoner's property pay the debt, or give such security, as the court prescribes, for the payment thereof, either absolutely, or contingently upon a recovery in an action; in which case, or where the prisoner is not indebted, the court may grant or delay the prayer of the petition, as justice requires.

§ 2226. Effect of order appointing trustee.

The entry of the order, appointing one or more trustees, and the filing of the papers upon which it was granted, vest in the trustee or trustees all the right, title, and interest of the prisoner, in and to any property, real or personal. Where the prisoner owns real property, an exemplified copy of the order must be recorded in the property office for recording deeds, in each county where the real property is situated.

Art. 2, R. S. § 3. See § 2177.

§ 2227. Removal of trustee; appointment of new trustee.

Upon the application of any person entitled to apply for an order, appointing trustees of the prisoner's property, and upon such a notice as the court prescribes, to the petitioner, and to such other persons interested, as the court thinks proper to designate, the court, by which the order was granted, may, in its discretion, remove any trustee, and appoint another in his place; or may appoint one or more additional

 Art. 1. Precedent for Petition by Creditor.

trustees. The new trustee or trustees, so appointed, have the same power and authority, are vested with the same right, title, and interest, and are subject to the same duties and liabilities, as if he or they had been appointed by the original order.

§ 2228. Prisoner's property ; how applied.

After deducting their commissions and expenses, allowed by law, and paying the prisoner's debts, the trustees may, from time to time, under the direction of the court by which they were appointed, apply the surplus of any money in their hands, to the support of the prisoner's wife and children, and of such other relatives as he is bound to support, and to the education of his children.

Part of § 4, art. 2, R. S.

§ 2229. Id. ; to be delivered to him on his discharge.

When the prisoner dies, or is lawfully discharged from imprisonment, the trustee or trustees must deliver over to him, or to his legal representatives, all his property, remaining in their hands, after deducting therefrom their lawful expenses and commissions.

Id. § 15.

§ 2230. Application of this article to persons heretofore sentenced.

This article applies to a prisoner who has been sentenced before this chapter takes effect, and to his property ; except where one or more trustees of his property have been theretofore appointed, by proceedings taken in pursuance of a statute then in force.

Under the Revised Statutes, the article for which this provision is a substitute provided for the appointment of trustees of the property of a criminal only where he was indebted to some person ; but the appointment might be made at the instance of "any of the criminal's relatives, or any relative of his wife," and the application of the property, after the payment of the criminal's debts, is directed to be made to the support of his family. The codifiers give at considerable length their reasons for extending the right to make the application to the persons named in § 2220. They also comment upon the fact that under the Revised Statutes the proceedings were loose, and opened the door to many abuses where the property to be sequestrated was of any considerable amount, which was doubtless owing to the fact that at the date of the enactment it rarely happened that the person convicted of a criminal offence was possessed of much property ; such cases being now of more frequent occurrence, the proceeding has been revised so as to secure greater certainty and fairness.

Precedent for Petition by Creditor.

To the County Court of the County of Ulster :

The petition of Margaret Haskins, as administratrix of, etc., of John

Art. 1. Affidavit of Applicant Showing Imprisonment.

Haskins, deceased, respectfully shows that she was appointed administratrix of the said John Haskins, deceased, on the 10th day of January, 1887, and qualified and entered upon her duties as such administratrix, and that as such administratrix she is a creditor of Patrick Larkin for the sum of \$552.50. That the said indebtedness arose upon a promissory note, a sworn copy of which is hereto annexed, the amount due being for the principal thereof and interest from July 17, 1885. That the said Patrick Larkin is imprisoned in the State prison at Dannemora for the term of ten years, from the 15th day of April, 1887, under the sentence of the Court of Oyer and Terminer, held in and for the county of Ulster, for the offence of manslaughter, as will more fully appear from the copy of the sentence of conviction of said Patrick Larkin, annexed to and accompanying this petition, duly certified by the clerk of the county of Ulster under the seal of said Court of Oyer and Terminer. That, at the time of his conviction and imprisonment, the said Patrick Larkin resided at the city of Kingston, in the county of Ulster, and that your petitioner resides at the same place aforesaid.

That the wife of said Patrick Larkin is Cornelia Larkin, and his children are Sarah Larkin, Nellie Larkin, and Martin Larkin, all residing at the city of Kingston aforesaid, they being the only next of kin and heirs at law of said Patrick Larkin. That there are no other relatives whom he is bound to support. That the names of his creditors are Charles G. Martin, Willis L. Nichols, and Thomas C. Sheridan, all residing at said city of Kingston, and Matthew Knapp and Charles M. Peterson, residing at the city of New York.

That the said Patrick Larkin is the owner of a farm of land, situate in the town of Ulster, in said county, and described as follows: (insert description); that he is the owner and holder of the following personal property and securities: (give schedule).

Wherefore, your petitioner prays the order of this court appointing one or more fit persons trustees to take charge of the property of the said Patrick Larkin, as prescribed by Article IV. of title 1 of chapter 17 of the Code of Civil Procedure.

Dated May 11, 1887.

MARGARET HASKINS.

ULSTER COUNTY, ss.:

Margaret Haskins, being duly sworn, says that she is the petitioner named in the foregoing petition subscribed by her, and that the matters of fact therein alleged are true to the best of her knowledge and belief.

(Add jurat.)

MARGARET HASKINS.

(Annex certified copy of sentence of conviction and affidavit.)

Affidavit of Applicant Showing Imprisonment.

ULSTER COUNTY, ss.:

Margaret Haskins, being duly sworn, says that she is the person petitioning for the appointment of a trustee to take charge of the property of Patrick Larkin, an imprisoned debtor, pursuant to the provisions of the Code of Civil Procedure; that the said Patrick Larkin is now actually confined in the State prison at Dannemora, in this State, under

Art. I. Order to Show Cause.

and by virtue of the sentence of conviction for manslaughter by the Court of Oyer and Terminer, a copy of which is hereto annexed.

(*Furat.*)

MARGARET HASKINS.

Order to Show Cause.

At a term of the Ulster County court, held at the chambers of the county judge, in the city of Kingston, on the 14th day of May, 1882 :

Present :—Hon. William S. Kenyon, *County Judge*.

In the Matter of the Application of Margaret Haskins for the appointment of a Trustee to take charge of the property of Patrick Larkin, an imprisoned debtor.

On reading and filing the petition of Margaret Haskins, dated and verified May 11, 1887, praying for the appointment of one or more trustees to take charge of the property of Patrick Larkin, an imprisoned debtor, and showing that he is imprisoned in a State prison under a ten years' sentence ; that he as well as the petitioner were residents of the county of Ulster at the time of such sentence, and giving the names of his relatives, next of kin, and creditors, together with a certified copy of the sentence of conviction thereto annexed, and the affidavit of the applicant that said Larkin is now actually imprisoned under said sentence, and on motion of G. D. B. Hasbrouck, of counsel for said petitioner, it is

Ordered, that all creditors of said Patrick Larkin and all persons interested in his estate show cause at a term of this court, to be held at the chambers of the judge, in the city of Kingston, on the 15th day of June, 1887, at ten o'clock A. M. of that day, why such trustee should not be appointed according to the prayer of said petitioner. It is further ordered that personal service of a copy of this order be made upon each of the creditors of said Patrick Larkin and all persons interested in his estate, at least ten days before said 15th day of June, 1887.

WM. S. KENYON,

County Judge of Ulster County.

Order Appointing Trustee on Return of Order to Show Cause.

At a term of the Ulster County court, held at the chambers of the county judge, in the city of Kingston, on the 15th day of July, 1887 :

Present :—Hon. William S. Kenyon, *County Judge*.

In the Matter of the Application of Margaret Haskins for the appointment of a Trustee to take charge of the property of Patrick Larkin, an imprisoned debtor.

On the return of the order to show cause herein granted on the 14th

Art. 1. Order Appointing Trustee on Return of Order to Show Cause.

day of May, 1887, with due proof of personal service thereof on (name persons served), at least ten days before this date: Now, on reading and filing the petition, order, and affidavit on which the order to show cause was granted, and it appearing that Patrick Larkin is actually imprisoned in a State prison under a sentence for more than one year, and after hearing D. W. Roosa, Esq., on behalf of the creditor, Charles M. Peterson, no one else appearing:

On motion of G. D. B. Hasbrouck, attorney for the petitioner, it is ordered that Carey S. Connelly, of the town of Esopus, in the county of Ulster, be and he is hereby appointed a trustee of the property of said Patrick Larkin, pursuant to the provisions of Article IV. of title 1, chapter 17, of the Code of Civil Procedure.

WILLIAM S. KENYON,
County Judge of Ulster County.

CHAPTER XIII.

SUMMARY PROCEEDINGS TO RECOVER THE POSSESSION OF LAND.*

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* The works of McAdam, Taylor, and Wood respectively on Landlord and Tenant treat this subject more or less fully. See, also, American and English Encyclopedia of Law, Article "Landlord and Tenant."

Art. I. Character of Proceedings.

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ARTICLE I.

CHARACTER OF PROCEEDING.

This title is a substitute for two articles of the Revised Statutes, the first treating of "forcible entries and detainers," and the second of summary proceedings to recover the possession of land in other cases. The revisers deemed separate and distinct proceedings unnecessary, and have embodied the necessary steps to obtain possession of real estate in a summary manner, in a single statutory enactment. They have also included the substance of a large number of amendatory acts, and much condensed the provisions by amendments to the language used, and the consolidation of similar provisions relating to separate subjects, as well as by the omission of what they deemed superfluous provisions. These proceedings are entirely statutory, and must be conducted in strict accordance with the law. *Miner v. Burling*, 32 Barb. 540; *Coatsworth v. Thompson*, 5 State Rep. 809. The statutory remedy by way of summary proceeding is in derogation of the common-law remedy by action, and must be strictly construed; a peculiar and limited jurisdiction is thereby conferred on certain magistrates, which can be executed only in the way prescribed. *Benjamin v. Benjamin*, 5 N. Y. 385.

 Art. 2. When Tenant may be Removed.

Where summary proceedings are brought to recover land a justice is not ousted of jurisdiction because the title of the land comes into question. The provisions of the Code relating to the dismissal of an action where the question of title arises relate exclusively to civil actions, and do not apply to summary proceedings. Where a life tenant leases premises, and after his death the guardian of the infant remainderman permits the tenant to remain in possession until the infant attains a majority and she thereafter demands rent, the facts establish the conventional relation of landlord and tenant and enable her to maintain summary proceedings. *Dorschel v. Burkly*, 18 Misc. 240; *Matter of White*, 12 Abb. N. C. 348; *Lozman v. Sprague*, 73 Hun, 408; *People ex rel. Vogler v. Palmer*, 16 Hun, 136; *Benjamin v. Benjamin*, 5 N. Y. 388; *People ex rel. Hannigan v. Ingersoll*, 20 Hun, 316.

ARTICLE II.

WHEN TENANT MAY BE REMOVED. § 2231.

§ 2231. When tenant may be removed.

In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, and his assigns, under-tenants, or legal representatives, may be removed therefrom, as prescribed in this title :

1. [Am'd, 1894.] Where he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term, without the permission of the landlord; including, elsewhere than in the city of New York and Brooklyn, a case where the person to be removed became the occupant of the premises as a servant or employe and the relation of master and servant or employer and employe has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties, has expired; but if by such agreement the servant was to be permitted to occupy such premises for a period beyond the term of employment such removal shall not be had under this subdivision unless such period so permitted for occupancy has expired, or the relation of master and servant or employer and employe was lawfully terminated before the expiration of such term of employment; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner.

L. 1894, ch. 333.

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in this title for the service of a precept.

3. Where in any city in this State he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days

Art. 2. When Tenant may be Removed.

after the same shall be payable, of any taxes or assessments levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served, in behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal representatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

5. Where the demised premises, or any part thereof, are used or occupied as a bawdy house or house of assignation for lewd persons, or for any illegal trade or manufacture, or other illegal business.

2 R. S. 512, § 28 (2 Edm. 529), am'd; L. 1849, ch. 193; also, § 55, added by L. 1868, ch. 764, § 1 (7 Edm. 335), and L. 1873, ch. 583, § 1 (9 Edm. 653), consolidated and am'd.

The statute applies only where the conventional relation of landlord and tenant exists, not in every case where ownership is in one and possession in another; but only where he who is in possession has, by some act or agreement, recognized the other as his landlord, and assumed the character of a tenant under him, so that he is not at liberty to dispute his title. It must be by agreement and not by operation of law. *People v. Annis*, 45 Barb. 304; *Benjamin v. Benjamin*, 5 N. Y. 383; *Roach v. Cosine*, 9 Wend. 227; *People v. Cushman*, 1 Hun, 73; *Sims v. Humphrey*, 4 Denio, 185; *People v. Bigelow*, 11 How. 83; *People v. Hovey*, 4 Lans. 86; *Livingston v. Tanner*, 14 N. Y. 64; *Doolittle v. Eddy*, 7 Barb. 74; *Keneda v. Gardner*, 3 id. 589; *People v. Simpson*, 37 id. 432; *Evertson v. Sutton*, 5 Wend. 281; *Wright v. Mosher*, 16 id. 454; *People v. Simpson*, 28 N. Y. 55; *Russell v. Russell*, 32 How. 400. A purchaser of leased premises may maintain summary proceedings for non-payment of rent based upon failure to pay rent falling due since its purchase, and also prior rents assigned to him by his grantor. *Ottinger v. Prince*, 2 City Court, 353. A tenant may be disposed for non-payment of part of the rent where he agrees to pay part in board furnished the landlord and part in cash; he may be disposed for non-payment of the cash. *Mahan v. Sewell*, 6 Supp. 662, 25 St. R. 930. Occupancy on shares comes within the act of summary dispossession of tenants. *Barry v. Smith*, 69 Hun, 88, 53 St. Rep. 57, 23 Supp. 261, affirming 1 Misc. 240, 53 St. Rep. 57, 22 Supp. 129. To hold a

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tenant liable for ejectment for keeping a house of assignation, knowledge of the acts complained of must be brought home to him, and it must be shown that he had authority to prevent them. *Moench v. Young*, 16 Daly, 143, 29 St. Rep. 731, 8 Supp. 532. But it is no defence to summary proceedings taken upon the ground that the house was used as a house of assignation that the tenant has discontinued the business before the trial. *Stearns v. Hemmens*, 21 Abb. N. C. 312, 1 Supp. 52, 16 St. Rep. 701, 14 Daly, 501.

Where the lease provided that if the landlord deemed the tenancy undesirable the premises would be vacated on two months' notice in writing, the landlord is not bound to give any grounds for deeming the tenancy undesirable. *Manhattan L. Ins. Co. v. Gosford*, 3 Misc. 509, 52 St. Rep. 419, 23 Supp. 7. In proceedings to remove a tenant and under-tenant as holding over, the under-tenant set up that he was a tenant and had paid rent, but it was shown that he was a tenant of the lessee, and that the lease having expired it was a proper case for summary proceedings. *O'Connor v. Schmitz*, 36 St. Rep. 317, 13 Supp. 442. In *Brown v. Sullivan*, 1 Misc. 161, 48 St. Rep. 685, 20 Supp. 634, the question of the genuineness of the signature of the grantor was in question, and it was held that the weight of evidence was in favor of the genuineness of the lease. Where the United States Government leases a part of the government property, it was held that the State courts had jurisdiction in summary proceedings. *Lotterlee v. Murphy*, 67 Hun, 76, 51 St. Rep. 553, 21 Supp. 1120. The right to re-enter after breach of condition subsequent is not assignable to or enforceable by one not vested with a reversionary estate. *Kelly v. Smith*, 41 St. Rep. 620, 16 Supp. 521. Where the mortgagee of the premises held a power of attorney from the landlord to rent the premises and apply any rent on the mortgage, and to let the premises, it was held that the relation of landlord and tenant did not exist between him and the person to whom the premises were let, and that he could not maintain summary proceedings. *Matter of Hosley*, 56 Hun, 240, 30 St. Rep. 711, 9 Supp. 752. Summary proceedings for non-payment of rent may be maintained, although the landlord demanded less than was due and was refused. *Sheldon v. Testera*, 21 Misc. 477, 47 Supp. 653. If the term is indefinite the fact that the rent is payable monthly is

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not conclusive of a letting from month to month. *Cohen v. Green*, 21 Misc. 334, 47 Supp. 136.

A sub-tenant, who holds under an assignee of the original lessee, is liable to be dispossessed for non-payment of rent at the suit of his lessor's subsequent assignee; he cannot gainsay his title. *People v. Angel*, 61 How. 157. The relation of landlord and tenant exists between the lessee, or his assignee, and the assignee or grantor of the lessor, provided such relation existed between the original parties. *Birdsall v. Phillips*, 17 Wend. 473; *Miller v. Levi*, 44 N. Y. 489. A landlord may institute proceedings to recover possession for non-payment of rent, notwithstanding a covenant to pay for improvements at the expiration of the term. *Paine v. Trinity Church*, 7 Hun, 89. Where a tenant holding under one landlord took a lease from another, and surrendered to his first lessor, the latter cannot be dispossessed as the tenant of the second lessor. *Freeman v. Ogden*, 40 N. Y. 105. If a tenant abandons possession before the expiration of his lease, and another immediately takes possession without his privity or consent, no such relation arises as authorizes the lessor to remove him for holding over the term; a verbal declaration, made by the intruder at the time he took possession, that he did so under the former tenant, could not create the relation of landlord and tenant. *People v. Hovey*, 4 Lans. 399. Where a lease is given to commence on the termination of an existing lease, the original lessee cannot be dispossessed by the new one. *Imbert v. Hallock*, 23 How. 456. Where the party in possession had conveyed the fee by a deed, agreeing that he should retain possession till a day fixed, it did not constitute a tenancy. *Sims v. Humphrey*, 4 Den. 85. Nor does a purchaser under an executory contract, under which he is in possession, become a tenant by breach of his contract, so that summary proceedings will lie. *People v. Bigelow*, 11 How. 83.

An agreement to pay for the privilege of putting an office, etc., on a pier does not create the relation of landlord and tenant. *People v. Cushman*, 1 Hun, 73. The tenant must, at the time the proceedings are instituted, hold over under an agreement constituting a tenancy; if he holds over under a new agreement with the landlord, as a contract for purchase, he cannot be dispossessed under the statute. *Burnett v. Scribner*, 16 Barb. 621; *Capet v. Parker*, 3 Sandf. 662.

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Where a tenant has been evicted by the landlord from a portion of the premises of substantial value, he cannot be evicted under summary proceedings for non-payment of rent so long as such eviction continues. *People v. Gedney*, 10 Hun, 151. Where a guardian demises a house belonging to his ward, which is, on the ward's coming of age, conveyed to a third person, the grantee may maintain summary proceedings under the statute. *People v. Ingersol*, 20 How. 316. The landlord's right of re-entry for breach of a condition subsequent cannot be enforced by summary proceedings; he must resort to his action of ejectment. *Penoyer v. Brown*, 2 McCarthy's Civ. Pro. 61. The relation of landlord and tenant exists where the owner agrees that a mortgagee shall occupy the premises till the mortgage is satisfied; on payment after a year, the mortgagor may have summary proceedings. *Hunt v. Comstock*, 15 Wend. 665. And where one goes in possession under an agreement to accept a lease for a specified time and refuses afterward to do so, the relation exists and the party in possession is a tenant at sufferance. *Anderson v. Prindle*, 23 Wend. 616. The proceeding cannot be had where a term expires by forfeiture. *Oakley v. Schoonmaker*, 15 Wend. 226; *Beach v. Nixon*, 9 N. Y. 35. It was formerly held that the relation of landlord and tenant did not exist under an agreement to work a farm on shares. *Oakley v. Schoonmaker*, 15 Wend. 226; *Putnam v. Wisc*, 1 Hill, 234; *Wright v. Mosher*, 16 How. 454; *Russell v. Russell*, 32 id. 400; see sub. 3, § 2232. It does not exist under an agreement for rooms and board although the agreements are for separate sums named. *Wilson v. Martin*, 1 Denio, 602. Nor where a purchaser of real estate under a contract fails to pay according to its terms. *Williams v. Bigelow*, 11 How. 84; *Burnett v. Scribner*, 16 Barb. 622. Nor where a tenant for the life of another holds over after the determination of the life estate. *Livingston v. Tanner*, 4 Kern. 64. If a tenant is holding under a new agreement, he cannot be proceeded against for default in payment of rent, under a previous agreement; nor because he has failed to comply with any of the terms of the former agreement. *Burnett v. Scribner*, 16 Barb. 621; *People v. Swayze*, 15 Abb. 432. A tenancy from year to year is a tenancy for one or more years; such a tenant may be proceeded against at the expiration of any year of his tenancy without notice to quit. *Park v. Castle*, 19 How. 30; *Smith v. Littlefield*, 51 N. Y. 539. Where

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the agreement is that the lease may be terminated by sixty days' notice, and the tenant refuses to quit after such notice and expiration of the time limited, he may be similarly proceeded against. *Miller v. Levi*, 44 N. Y. 489. A tenant cannot be removed where the landlord has done some act which amounts to an acknowledgment of his right to retain possession. *Wilder v. Embank*, 21 Wend. 587; *Prindle v. Anderson*, 19 id. 391. Summary proceedings will lie to remove the tenant of a furnished house where it is demised at a gross rent. *Armstrong v. Cummings*, 20 Hun, 313; *Singley v. Jones*, 1 City Court, 127. In such a case the furniture is but an incident and the rent issues out of the land only. S. C. 58 How. 33. A person in possession may show that he was formerly the owner and transferred the premises to the person claiming to be the owner, and took back a lease under a usurious agreement, which was void. The rule that a tenant cannot dispute his landlord's title does not apply, as the agreement is void. *People ex rel. Ainslee v. Howlett*, 76 N. Y. 574. Where tenant occupies after termination of lease with consent of landlord, it is presumed the tenancy continues on same terms as before, and a notice to quit is necessary to terminate the tenancy, but the tenant can be dispossessed for non-payment of rent. *People v. Paulding*, 22 Hun, 91. Where a tenant was allowed to occupy premises without being limited to any term and without any fixed rent being reserved, but only such rent as the occupation was worth, it was held to be a tenancy at will and within the statute. *Sarsfield v. Healy*, 50 Barb. 245. Where there is a tenancy from year to year, the tenant may be evicted after one month's notice to quit, terminating with the year. *Prouty v. Prouty*, 5 How. 81. The proceeding cannot be had for non-payment of rent, where the landlord receives rent due at subsequent quarter. *Anderson v. Prindle*, 23 Wend. 616.

Where the lease provides that on breach of a condition at the option of the landlord, the tenancy shall cease without notice, default in payment of rent does not constitute such a breach as to authorize proceedings without notice. *Beach v. Nixon*, 9 N. Y. 35. The eviction of a tenant by these proceedings for non-payment of rent does not operate to discharge him from the payment of accrued rent. An action for breaches of covenant already incurred is maintainable. *Johnson v. Oppenheim*, 55 N.

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Y. 280. If a tenant knowingly sub-let a portion of the demised premises for an illegal purpose, as for a policy shop, the landlord may annul the lease and recover possession by summary proceedings in case the violation of law continues at the time of the institution of the proceeding. *Shaw v. McCarty*, 59 How. 487; *People v. McCarty*, 62 id. 152; *Shaw v. McCarty*, 63 id. 286; *Jones v. Demady*, 2 McCarty's Civ. Pro. 246. The landlord of a licensed innkeeper cannot maintain summary proceedings to enforce a forfeiture, on the ground that the tenant has been guilty of selling liquor on Sunday. The remedy is by ejectment. So held in *Baltmann v. Kindslon*, 2 McCarty's Civ. Pro. 47. Where a demand of the rent has been personally made, no notice in writing is necessary. *Rogers v. Lynds*, 14 Wend. 172; *People v. Gross*, 50 Barb. 231. But the demand, if made, must be made as required at common law. The landlord must demand the precise amount due on the day when due and before sunset, and on the land, and even though no person is found to pay it to. *Jackson v. Hanson*, 17 Johns. 66; *Walcott v. Schenck*, 16 How. 449. But a demand of one of two joint tenants or by one of two owners is sufficient. *Geisler v. Acosta*, 9 N. Y. 227; *Griffin v. Clark*, 33 Barb. 46.

Where the tenant has made a general assignment, a demand of the lessee is sufficient. *Bokce v. Hamersley*, 16 How. 461. When it was agreed in a lease, that if intoxicating liquors were sold on the premises, double rent should be paid, and the lessor might dispossess the lessees for non-payment thereof, it was held that if the lessees refused to pay such double rent, they might be dispossessed by summary proceedings. *People v. Bennett*, 14 Hun, 58. Summary proceedings may be had against corporations as well as individuals. *Brown v. Mayor of New York*, 66 N. Y. 385. Where a tenant for one or more years holds over after the expiration of his term, the landlord has the option to treat him as a trespasser, or as a tenant for another year. It is not in the power of the tenant to refuse to be treated as such under such circumstances. *Schuyler v. Smith*, 51 N. Y. 309. A right of dower gives a widow no title under which she can dispossess a tenant. *Weisinback v. Pohalski*, Abbott's Annual, 1884, p. 303. But when a tenant dies leaving a widow, she becomes by operation of law the assignee of her husband's term. If she remains in possession, summary proceedings may be had. *Michenfelder*

Art. 2. When Tenant may be Removed.

v. Gunther, 66 How. 464. Where a landlord has a tenant in possession and lets to another, the tenancy of the latter to begin on the day on which that of the former ends, if the tenant in possession wrongfully holds over, the new tenant may institute proceedings to remove him. *Becar v. Flues*, 64 N. Y. 518. And it was held in *Imbert v. Hallock*, 23 How. 456, that the landlord could also maintain the proceeding. Where a tenant dies before the expiration of his term, administration may be necessary before proceedings can be had, but where the term has expired before the death of the tenant, the person in possession may be proceeded against. *Howard v. Ellis*, 4 Sandf. 369. The remedy does not apply to the case of a tenant for the life of another, who continues in possession after the determination of his estate. *Livingston v. Tanner*, 14 N. Y. 64; *Torrey v. Torrey*, id. 430; *Buck v. Binninger*, 3 Barb. 391. Judge McAdam, in his work on Landlord and Tenant, at page 622, cites the case of *Ottenger v. Prince*, decided by him in Marine Court, holding that a grantor could, by deed and assignment, properly executed, confer upon his grantee all his rights and remedies; and that where the two were transferred to the same person, he was by force of 1 Edmonds' Revised Statutes, page 698, § 23, put in the place of the grantor; that the grantee could, under such circumstances, recover all in a single action, and there was no good reason why he should split the demand to maintain summary proceedings. Judgment was rendered for the landlord. To authorize the proceedings, the conventional relation must exist. *Livingston v. Tanner*, 14 N. Y. 64; *People v. Simpson*, 28 id. 55; *Putnam v. Wise*, 1 Hill, 234; *Caswell v. Districh*, 15 Wend. 379. The holding over contemplated by statute is that in which the term has expired by lapse of time, not by breach of conditions. *Beach v. Nixon*, 9 N. Y. 35. But this is to be distinguished from a provision which is only a limitation and not a condition. *Miller v. Levi*, 44 N. Y. 489. As to when a lease for a year or for years expires, see *Wilcox v. Woods*, 9 Wend. 346; *People v. Robertson*, 39 Barb. 9; *Chretien v. Doney*, 1 N. Y. 419; *House v. Burr*, 24 Barb. 525. Where a sale has been consummated by a deed, the relation of landlord exists on the part of the purchaser toward tenants of the vendor. *Bostwick v. Frankfield*, 74 N. Y. 207. Not as between master and servant, where servant is furnished a house without rent as part of his compensation. *People v. Annis*, 45 Barb. 304;

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Kerrains v. People, 60 N. Y. 221; *Hayward v. Miller*, 3 Hill, 90; *Miller v. Sisson*, 53 Barb. 258. Nor between tenant in possession and the assignor of his lessee. *People v. Simpson*, 28 N. Y. 55. Payments by a tenant in possession on account of rent to a purchaser at a tax sale at the latter's solicitation, *held*, not an attornment of the tenant which would create the conventional relation of landlord and tenant, and authorize the institution of summary proceedings. *Sperling v. Isaacs*, 22 Week. Dig. 174.

Where a lease is terminated by reason of a conditional limitation contained therein summary proceedings on the ground of non-payment of rent will not lie, but the remedy is by proceedings against tenant for holding over. *Estelle v. Dinsbeer*, 9 Misc. 487, 61 St. Rep. 97, 30 Supp. 243. When an oral agreement was made by the owner of real estate to devise land to persons if they would live with him, it was held not to be an agreement for leasing premises, reversing summary proceedings to recover possession. *Matter of Matthews*, 49 Hun, 346. Summary proceedings cannot be maintained upon a condition in the lease against sub-letting, which provides that the violation of the provisions terminates the lease. *Kramer v. Amberg*, 16 Civ. Pro. 445, 4 Supp. 613, 25 St. Rep. 60. Any one of several tenants in common or co-lessors may authorize their agent to demand payment of the rent and to institute summary proceedings for non-payment. *Wyckoff v. Frommer*, 12 Misc. 149, 33 Supp. 11, 66 St. Rep. 511. Where the property is held by husband and wife by virtue of a joint conveyance the husband may maintain summary proceedings in relation thereto. *Peck v. O'Leary*, 8 Misc. 350, 59 St. Rep. 594, 28 Supp. 687. As to when conventional relation of landlord and tenant exists between landlord and lessee, see *Stover v. Chasse*, 6 Misc. 394, 56 St. Rep. 333, 26 Supp. 740. The right of the landlord to maintain summary proceedings after the expiration of the lease is not impaired by the fact that he has given a lease to a third party to commence at the expiration of the former lease. *Golet v. Roc*, 14 Misc. 28, 35 Supp. 145, 69 St. Rep. 372, 25 Civ. Pro. 86. It seems that where a lessor has leased part of the premises to one person, and subsequently the whole of the premises to another, the subsequent lease operates as an assignment of the rent due from the former and gives the subsequent tenant a right to maintain summary proceedings in relation thereto. *Russo v. Yuzolino*, 19 Misc. 28, 42 Supp. 482.

Art. 3. When Person in Possession of Real Property may be Removed.

76 St. Rep. 482. A guardian in socage may lease infant's land in his own name and may maintain summary proceedings as guardian. *Gallagher v. David Stevenson Brew. Co.*, 13 Misc. 40, 68 St. Rep. 165, 34 Supp. 94, 25 Civ. Pro. 106. No matter how small the amount of rent that may be due under the lease, the landlord is entitled to possession. *Pearson v. Germond*, 83 Hun, 88, 63 St. Rep. 842, 31 Supp. 358. A wife having an estate for life, if she remains a widow, upon condition that she maintain their children, was held to be the owner, so that upon foreclosure her estate was transferred to the purchaser on the sale, who became entitled to maintain summary proceedings. *Lang v. Everling*, 3 Misc. 530, 52 St. Rep. 489, 23 Supp. 329. A landlord who has conveyed all his interest in the property cannot maintain summary proceedings, *Boyd v. Sametz*, 17 Misc. 728, 40 Supp. 1070. Nor can summary proceedings be maintained by a partner who has leased property to the partnership, the rent to be paid by the firm, nor can his assignee maintain summary proceedings. *Bailey v. Crowell*, 13 Misc. 63, 34 Supp. 53, 68 St. Rep. 9. To maintain summary proceedings the party must hold the entire estate of the landlord in the term demised to the tenant against whom the proceedings are taken so as to constitute him assignee of the landlord. *Kelly v. Smith*, 41 St. Rep. 620, 16 Supp. 521.

The provisions of a lease executed after 1885 authorizing the landlord to take summary proceedings in case of default in the payment of the rent is bar to proceedings for non-payment of taxes. *Bixby v. Casina Co.*, 14 Misc. 346, 35 Supp. 677, 70 St. Rep. 471. A final order in summary proceedings dismissing the petition upon failure of petitioner to prove oral lease relied upon as the basis of the proceedings is a bar to subsequent proceedings under the statute making a tenancy for which there is no specified duration to terminate on the first day of May. *Lazarus v. Ludwig*, 18 Misc. 474, 41 Supp. 999, 75 St. Rep. 1369.

ARTICLE III.

WHEN PERSON CONTINUING IN POSSESSION OF REAL PROPERTY MAY BE REMOVED. §§ 2232, 2233.

§ 2232. Person holding over land sold, etc., may be removed.

In either of the following cases, a person, who holds over and continues in possession of real property, after notice to quit the same has been given, as prescribed in

 Art. 3. When Person in Possession of Real Property may be Removed.

§ 2236 of this act, and his assigns, tenants, or legal representatives, may be removed therefrom, as prescribed in this title :

1. Where the property has been sold by virtue of an execution against him, or a person under whom he claims, and a title under the sale has been perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in title ninth of this chapter, of a mortgage, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where he occupies or holds the property, under an agreement with the owner to occupy and cultivate it upon shares, or for a share of the crops, and the time, fixed in the agreement for his occupancy, has expired.

4. [Am'd, 1894.] Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, any real property, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued without permission from the latter; or, after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed.

Sub. 4 of § 28, R. S., am'd; L. 1874, ch. 208, and § 31, R. S.; L. 1894, ch. 232.

§ 2233. Id.; in case of forcible entry or detainer.

An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, under-tenants, and legal representatives, may be removed therefrom, as prescribed in this title.

2 R. S. 507, §§ 1 and 2 (2 Edm. 523).

This remedy may be had not only by the purchaser at the sale under execution, but by his grantee, and the regularity and validity of the proceeding cannot be inquired into, nor whether the purchaser was a *bona fide* purchaser. It is sufficient if the judgment and execution are regular on their face. *Brown v. Betts*, 13 Wend. 29. And the remedy may be had against the person in possession at the time of the sale under title subsequent to the judgment, but the papers must show that the third person so claims title under the execution debtor. *Hallenbeck v. Garner*, 20 Wend. 22; *Birdsall v. Phillips*, 17 id. 464. But the execution debtor may deny the facts upon which the summons issued against him, and is entitled to a jury trial. *Spraker v. Cook*, 16 N. Y. 567. It is no defence, however, that the person proceeded against is a tenant in common of the premises sold; the purchaser acquired all his title, and has a right to be substituted to his possession of the premises. *Brown v. Betts*, 13 Wend. 29.

On summary proceedings by a purchaser of an estate for years, at an execution sale, any person may be removed who is

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in possession under the title acquired by the purchaser; the provisions apply to the judgment debtor, and all holding under him under pretence of title acquired from him. *People ex rel. Higgins v. McAdam*, 84 N. Y. 287. The provisions of Code, §§ 2951 and 2952, relating to removal of causes from justices' court, where an answer is interposed which raises a question of title to real property, do not apply to summary proceedings for removal of squatter under § 2232, subdivision 4. *Matter of White*, 12 Abb. N. C. 348. To maintain summary proceedings after the sale of a leasehold on execution, the sale must be advertised and conducted as the law requires for a sale of real property. *Mitnacht v. Cocks*, 65 How. 84. But no irregularity in the judgment on which execution was issued can be inquired into. *Jack v. Cashin*, 1 City Ct. 72; *Getting v. Mohr*, 34 Hun, 340. Where a party is in possession of land by her tenant, and a person setting up a claim to the premises through a tax deed, afterward adjudged invalid, induces the tenant to attorn to him, and enters into possession of the premises, he is an intruder within the meaning of § 2232 of the Code, and may be ejected by summary proceedings. *O'Donnell v. McIntye*, 2 State Rep. 343; S. C. 1 id. 68, 41 Hun, 100, 9 Civ. Pro. 370, reversing 16 Abb. N. C. 84.

Section 2233 gives the remedy by summary proceedings in those cases where, before the Code, the remedy under proceedings for forcible entry and detainer were available. This remedy is much speedier and more simple than the proceeding under the Revised Statutes, now repealed. In *Wood v. Phillips*, 43 N. Y. 152, a forcible entry and detainer was defined, as also in *Porter v. People*, 7 How. 441; *People v. Field*, 52 Barb. 198; *People v. Smith*, 24 id. 16. In an action for forcible entry and detainer, it appearing that in the alleged act of entry no threats of personal violence were used, no unusual weapons displayed, nor any unusual number of persons nor riotous assemblage, it was held that the circumstances of violence and terror necessary to constitute forcible entry were lacking. *Dudley v. Chenfrau*, 2 Edw. Sel. Cas. 128. An injunction to stay summary proceedings should not be granted under the Code of Civil Procedure on appeal from a judgment in a proceeding for forcible entry and detainer, unless in case of allegation of fraud or collusion in the proceedings, or where the magistrate has no jurisdiction. Forcible entry by

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servants of a railroad company, followed by possession by the company, held to be presumably the act of the corporation or ratified by it. *People v. N. Y. Central R. R. Co.*, 51 N. Y. 623. An owner of land wrongfully held out of possession may watch his opportunity, and if he can regain possession peaceably, may maintain it and resist attempts by the former occupant to retake possession without being liable under the statute for forcible entry and detainer. *Bliss v. Johnson*, 73 N. Y. 529. Where a person is in possession of real estate, even though he be a mere tenant by sufferance, or has not paid his rent, or holds over, the owner can only regain possession by proceeding by process of law. Public policy forbids a resort to violence. *Health Department of New York v. Police Department of New York*, 41 N. Y. Super. 323, affirming 51 How. 157.

In proceedings under the statute, before the Code, for forcible entry and detainer, an affidavit verified in the manner prescribed for pleadings by the Code was insufficient; such verification is on information and belief, and did not satisfy the statute. The proceedings are summary and liable to technical objections. *People v. Whitney*, 1 T. & C. 533. A mere entry under claim of title without force which could give the prior occupant ground of apprehension or danger from standing in defence of possession, is not a forcible entry or detainer, within the meaning of the statute. *People v. Smith*, 24 Barb. 16; *Willard v. Warren*, 17 Wend. 257. In forcible entry and detainer, the main question is, whether the party entered by force upon one previously having a peaceable possession under claim of right, and whether the person whose possession was invaded has been held out by force. This does not involve the determination of conflicting titles to real estate. *Kelly v. Sheehy*, 60 How. 439. It was held that a person entering under a tax deed and remaining in possession after it has been adjudged void for invalidity in the assessment of the tax is not a "squatter" or "intruder" within the meaning of this section of the statute, which authorizes summary proceedings to remove, for he did not enter without title or legal authority. Title is not an issue in such a proceeding. It is enough for plaintiff to show actual possession at the time when defendant attempted by force to eject plaintiff, and that defendant did, by force or fear inspired by force, drive or keep plaintiff from the premises. *O'Donnell v. McIntyre*, 16 Abb. N. C. 84, reversed, 2

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St. Rep. 343, 41 Hun. 100. And in *Willard v. Warren*, 17 Wend. 257, it is said, that to constitute a forcible entry and detainer violence is necessary, or some acts tending strongly toward violence in the nature of gestures, menaces, threats, or such demonstrations as give reasonable ground to apprehend injury in defending the premises. The breaking of the lock on an out-building of plaintiff does not constitute a forcible entry; it must be more than a trespass, and to constitute a forcible entry the same circumstances of violence are requisite, and the keeping in the house, of which possession has been forcibly obtained, a large number of people with weapons, or threats of injury to the person formerly in possession, in case of his return, is a forcible detainer. *People v. Rickert*, 8 Cow. 226. The question of title was not involved in the proceeding under the statute, as now only the right to possession is in question. *Carter v. Newbold*, 7 How. 166. In case of proceedings under the statute for entry into a church, it was held the proceedings should be taken in the name of the corporation and not of the individual trustees. *People v. Fulton*, 11 N. Y. 94. Any person lawfully in possession and excluded therefrom has the benefit of the statute. *People v. Carter*, 29 Barb. 208; *People v. Reed*, 11 Wend. 157; *People v. Van Nostrand*, 9 id. 50. Where one tenant in common had forcibly intruded upon the possession of his co-tenants and been forcibly evicted, he could not have the proceeding. *King v. Phillips*, 1 Lans. 421. The complainant ought in his petition to disclose the nature of his right to the possession, and how, and from whom, it was acquired, so that it may appear that he has the legal right, and an allegation as to his rights, without facts to sustain it, is a legal conclusion. It will not, however, deprive the officer of jurisdiction. *People v. Field*, 52 Barb. 198. It is not necessary that the complainant in forcible entry and detainer should prove himself seized of a freehold or possessed of a term of years; possession is enough. *People v. Van Nostrand*, 9 Wend. 50; *People v. Reed*, 11 id. 157; *People v. Carter*, 29 Barb. 208. The proceeding must be instituted by the person forcibly put out, or forcibly held out of possession, or the guardian of any such person being a minor, and must be prosecuted in the name of the party whose legal right of possession has been invaded. *People v. Fulton*, 11 N. Y. 94. A mere intruder cannot maintain the proceeding, but every person lawfully in possession,

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and having some right to the possession, and forcibly excluded therefrom, is entitled to the benefit of the statute. *People v. Reed*, 11 Wend. 157. The main question to be determined in questions of this character is, whether the party charged, entered by force upon one having previously a peaceable possession under claim of right, and whether the person whose possession has been invaded has been held out by force; for no one has a right to assert his own title with force and violence against another in peaceable possession, and under color of title. *Kelly v. Sheehy*, 60 How. 439.

Summary proceedings cannot be maintained for land sold under foreclosure of mortgage, which contained no power of sale, as such mortgage became foreclosed on the happening of the condition under operation of law, and not by virtue of subdivision 2 of § 2232. As the statutory requirement on foreclosure by advertisement must be strictly pursued, a purchaser on a sale under such foreclosure of a mortgage given to secure notes, one of which has been transferred to a bank to which an assignment, unrecorded, of the mortgage, absolute in form, but shown by oral evidence to be as collateral only, has been made, cannot maintain summary proceedings to obtain possession of the mortgaged premises where the foreclosure proceedings were instituted and carried on in the name of the mortgagee only, without mentioning the assignment. *Weir v. Birdsall*, 27 App. Div. 405.

Actual occupancy at time of entry is not necessary in order to entitle the person injured to proceed under the statute. Naked prior possession is enough *prima facie* as against a stranger who shows no right to possession. *People v. Field*, 52 Barb. 198. But proof that at the time of the alleged forcible entry and detainer, and for a long time previous, the defendants had been in peaceable possession of the premises in question, and that the defendants had never been in possession, was held to be relevant to the questions before the jury as going to show that the defendants had not made a forcible entry within the intent of the statute. *People v. Wilson*, 13 How. 446. Valid right of possession by occupant need not be shown, it is enough that he be in peaceable and quiet occupancy at least, unless a mere trespasser, as against complainant. Where the defendant removed buildings from the premises and intruded on the possession with

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a number of men, it was enough to send the case to the jury. *People v. Field*, 52 Barb. 198.

Since, in proceedings to remove a person under the statute, the petition must allege either an actual or constructive possession, a petition alleging a peaceable entry by the petitioner, and a forcible ejection from the premises by the defendant, is insufficient. *Kent v. Sturges*, Abbott's Annual, 1884, p. 303. The examination of witnesses must, however, be confined to the appropriate statutory subjects of inquiry, and defendant cannot show or avail himself of any possession in a stranger. *Carter v. Newbold*, 7 How. 166. Nor, on the other hand, can the party instituting proceedings set up a claim of title in the State, or any one else in hostility to that under which he holds. *People v. Field*, *supra*. The questions to be tried are possession and the forcible character of obtaining or holding it, not the right of possession. *People v. Porter*, 7 How. 441. It is not necessary that a tenant attorn to the assignee of the lease in order to enable the latter to maintain summary proceedings. *Wetterer v. Soubirous*, 22 Misc. 739, 49 Supp. 1043, 83 St. Rep. 1043.

ARTICLE IV.

TO WHAT OFFICER OR COURT APPLICATION MAY BE MADE. § 2234.

§ 2234. [Am'd, 1895.] Application; to whom made.

Application for removal of a person from real property, as prescribed in this title, may be made to the county judge or special county judge of the county or a justice of the peace of the city or town or the mayor or recorder of the city wherein the real property, or a portion thereof, is situated. Application may also be made, if the property, or a portion thereof, be situated in the city of New York, to a judge of the city court of the city of New York, or the district court of the district within which the property, or a portion thereof, is situated, or if the judge of such court be for any reason disqualified, to the District Court of an adjoining district; if in the city of Brooklyn, to a police justice of that city; if in the city of Albany, or in the city of Troy, to a justice of the justices' court of that city; if in the city of Yonkers, to the city judge of that city; if in the cities of Syracuse, Rochester, or Buffalo, to a judge of the municipal court of said cities. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town, who keeps an office in the village.

Section 28, R. S., am'd; L. 1849, ch. 193 (2 Edm. 529); Const. art. 6, § 15; Const. 1846, art. 6, § 15; L. 1849, ch. 306; L. 1851, ch. 108; Const. 1869, art. 6, § 16; L. 1850, ch. 205, § 3; L. 1875, ch. 259, § 1; L. 1852, ch. 324, § 1; L. 1857, ch. 344, § 77, sub. 2; L. 1863, ch. 189 (6 Edm. 86); Co. Proc., § 66, am'd; L. 1870, ch. 741, § 4 (7 Edm. 774); L. 1877, ch. 187; L. 1870, ch. 386; L. 1821, ch. 47, § 1; L. 1834,

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ch. 271, §§ 1 and 19; L. 1872, ch. 866, § 1; L. 1873, ch. 61, § 2; L. 1878, ch. 186, § 7; L. 1876, ch. 196, §§ 5 and 16; L. 1849, ch. 125, § 26; L. 1870, ch. 470, § 13; L. 1854 ch. 96, § 25; L. 1857, ch. 361, § 6; L. 1895, ch. 946.

The following decisions as to the officer before whom proceedings may be taken were made under the Revised Statutes: *People v. Russell*, 19 Abb. 36; *Marry v. James*, 37 How. 52; *Carlisle v. McCall*, 1 Hilt. 399; *Gillilan v. Spratt*, 8 Abb. (N. S.) 13; *People v. Willis*, 5 Abb. 205; *McIntyre v. Hernandez*, 39 How. 121. A comparison of the statute with the Code will at once show their applicability as to the different courts. The following cases relate to jurisdiction of District Courts in New York City, and hold that the demised premises must be within the district in which the judgment was granted: *People v. Campbell*, 60 How. 102; *People v. Kelly*, 20 Hun, 549. Where the affidavit failed to show jurisdiction of justice, the proceedings, were held void. *Cuyler v. Crane*, 25 Hun, 67. The affidavit must show the premises are situated within the jurisdiction of the officer before whom the proceeding is instituted, or the jurisdiction fails, and recitals in the summons will not cure the defect. *People v. Broadman*, 4 Keyes, 59.

The city court of Albany has no power in summary proceedings to pass upon equities which may exist between the parties to a conveyance which is absolute on its face; but is limited to the legal title. *Matter of Hattersley v. Cronyn*, 22 Misc. 259; *sub nom.*, *Hattersley v. Cronyn*, 49 Supp. 1113, 83 St. Rep. 1113.

ARTICLE V.

PETITION BY PERSON ENTITLED TO POSSESSION. §§ 2235, 2236, 2237. Chapter 303, Laws 1882, 2 R. S., 7th ed., § 7.

§ 2235. Petition by person entitled to possession.

The application may be made by the landlord or lessor of the demised premises; the purchaser upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply. The applicant must present to the judge or justice, a written petition, verified in like manner as a verified complaint in an action brought in the Supreme Court; describing the premises of which the possession is claimed, and the interest therein of the petitioner, or the person whom he represents; stating the facts, which, according to the provisions of this title, authorize the application by the petitioner, and the

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removal of the person in possession; naming, or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and, if there are two or more such persons, and some are under-tenants or assigns, specifying who are principals or tenants, and who are under-tenants or assigns; and praying for a final order to remove him or them accordingly.

Sections 2, 3, and 29, R. S., am'd and consolidated. See 1 T. & C. 533.

§ 2236. Notice to be given in certain cases.

Where the person to be removed is a tenant at will, or at sufferance, the petition must state the facts, showing that the tenancy has been terminated, by giving notice, as required by law. Where the application is made in a case specified in § 2232 of this act, the petition must state that a notice, in behalf of the applicant, requiring all persons occupying the property to quit the same, by a day specified, has been either served personally upon the person or persons to be removed, or affixed conspicuously upon the property, at least ten days before the day specified therein.

Section 31, R. S., and L. 1857, ch. 396, §§ 2 and 3 (4 Edm. 617.)

Chapter 303, Laws of 1882, § 1.

No monthly tenant shall hereafter be removed from any lands or tenements in the city of New York, on the ground of holding over his term (except when the same expires on the first day of May), unless at least five days before the expiration of the term, the landlord or his agent serves upon the tenant in the same manner in which a summons in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy, and that, unless the tenant removes from said premises on the day on which his term expires, the landlord will commence summary proceedings under the statute to remove such tenant therefrom.

2 R. S. (7th ed.) 1126, § 7.

Whenever there is a tenancy at will or by sufferance, created by the tenant's holding over his term or otherwise, the same may be terminated by the landlord giving one month's notice in writing to tenant, requiring him to remove therefrom.

§ 2237. Petition by neighbor of bawdy-house, etc.

An owner or tenant of real property, in the immediate neighborhood of other demised real property, which is used or occupied as a bawdy-house, or house of assignation for lewd persons, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such an application, within five days thereafter; or having made it, does not in good faith diligently prosecute it, the person giving the notice may make such an application, stating in his petition the fact so entitling him to make it. Such an application has the same effect, except as otherwise expressly prescribed in this title, as if the applicant was the landlord or lessor of the premises.

Sections 56 and 61, R. S.; L. 1868, ch. 764 (7 Edm. 335).

A petition not verified is insufficient to confer jurisdiction, and an appearance by the defendant on the return day to hold open the case, when he afterward objects to the jurisdiction, is no waiver of his rights. *Coatsworth v. Thompson*, 5 State Rep. 809. In case the deed has not been delivered, a landlord, who has con-

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tracted to sell premises, may maintain the proceeding. *Miller v. Levi*, 44 N. Y. 489. When one of two joint lessors becomes sole owner of the land, and entitled to the rents by conveyance from the other, he may demand the whole rent, and on refusal dispossess in his own name. *Griffin v. Clark*, 33 Barb. 46. The assignee of the lessor may have the proceeding. *Birdsall v. Phillips*, 17 Wend. 464. Assigns refer to such as hold the entire estate of the landlord in the term demised to the tenant, against whom the proceeding is had. *Imbert v. Hallock*, 23 How. 456. Where a guardian has leased lands of a ward and the ward has become of age and conveyed, his grantor may maintain summary proceedings. *People v. Ingersoll*, 58 How. 351. Where a lessor of premises in part owned by him and in part held by him under lease, at his death devised to his son all his estate, it was held there was sufficient unity of interest and of the right of possession between such son and the executors of his father's estate, to enable them jointly to institute and maintain summary proceedings against the tenant for non-payment of rent. *People v. Dudley*, 58 N. Y. 323; *People v. Stuyvesant*, 1 Hun, 102.

A receiver may maintain the proceedings. *Matter of Renwick*, 1 Law Bull. 19. The affidavit may be made by a sole surviving trustee. *Thresher v. Keteltas*, 2 How. 63.

The affidavit must allege facts and not the evidence of facts, nor should matter of law be stated. *Hill v. Stocking*, 6 Hill, 314. It should not be uncertain or contradictory, but make out a plain case. *People v. Matthews*, 43 Barb. 168, affirmed, 38 N. Y. 451; *Wiggins v. Woodruff*, 16 Barb. 474; *Deuel v. Rust*, 24 id. 438; *Hill v. Stocking*, 6 Hill, 314; *Wallace v. Eaton*, 5 How. 99. In order to give the court jurisdiction, it must show that the conventional relation of landlord and tenant exists, created by agreement or recognized by the tenant, and it must also appear from the facts stated, that the term of the tenant has expired, or that, by virtue of the statute, the landlord is entitled to possession. *People v. Simpson*, 28 N. Y. 55; *Russell v. Russell*, 32 How. 400; *Buck v. Binninger*, 3 id. 391; *Deuel v. Rust*, 24 id. 438; *Matter of Robinson*, 1 id. 213; *People v. Matthews*, 38 N. Y. 451. Great particularity is required, and every fact necessary to give the officer jurisdiction must be distinctly stated, or the proceeding will be dismissed. It will be strictly construed as a pleading most stringently against the complainant, and its allegations must not

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be contradictory. *Wiggins v. Woodruff*, 16 Barb. 474; *Simpson v. Rhinelanders*, 20 Wend. 103; *Prouty v. Prouty*, 5 How. 81. An affidavit, if made by an agent of the landlord, must affirmatively show the fact of such agency, it is not enough to state it by way of recital. *People v. Johnson*, 1 T. & C. 578. It must show, where such notice is necessary, not only that a three days' notice in writing was served, but that it was served in the manner required by law. *People v. Keteltas*, 12 Hun, 67. A petition for removal for holding over in default in payment of rent, which simply alleges that the petitioner has caused at least three days' notice to quit to be served on the tenant without alleging the manner of such service, is insufficient, and where the tenant appears and no proof of service is given on the hearing, the petitioner is not entitled to the order. *Posson v. Dean*, 8 Civ. Pro. 177. It was held, in *Brown v. New York*, 66 N. Y. 385, that the omission of the venue in the affidavit is a jurisdictional defect. *People v. DeCamp*, 12 Hun, 378. But where the petition was verified and the signature at end of verification, the omission of signature to petition was held not to be jurisdictional. *Chadwick v. Spargur*, 1 Civ. Pro. 422. If a corporation is landlord, the mayor can make the affidavit. *People v. New York and Troy Steamboat Co.*, 6 Alb. L. J. 26. The affidavit must show that the applicant is entitled to the possession, and that the occupant holds in hostility to his title. *People v. Andrews*, 52 N. Y. 445. The affidavit should show the tenant in possession of the premises, and that he continues in possession "without the permission of his landlord." *Smith v. Huestis*, Hill & Denio, 236; *Rogers v. Wynds*, 14 Wend. 272; *Campbell v. Mallory*, 52 How. 183. It need not state the date or duration of the lease. *People v. Teed*, 48 Barb. 424. But where the proceedings are against different parties, it should distinctly show which are tenants and which are sub-tenants. *Wiggins v. Woodruff*, 16 Barb. 474.

Where the affidavit shows the relation of landlord and tenant was created by a contract of hiring, if the contract is not fully stated in the affidavit, it is sufficient to show the agreement was made between the agent of the landlord and the agent of the tenant, and the default of the tenant. *Estate of Norserworthy v. Bryan*, 33 Barb. 152. The affidavit must give a description of the premises from which it is sought to remove the tenant; it must not be too general or indefinite. *Campbell v. Mallory*, 22

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How. 183. Where there is no contract shown on part of alleged tenant, and no rent reserved as shown by the affidavit, it is insufficient. *Benjamin v. Benjamin*, 5 N. Y. 83. An affidavit alleging in substance that one conveyed the premises to plaintiff on the day named, and defendant, or his assigns, were then in possession as tenants at sufferance and held over, sufficiently states the tenancy. *People v. Ulrich*, 2 Abb. 28. An averment that the amount specified is due for rent, in connection with a statement that defendant holds over and continues in possession of the premises, is sufficient. *People v. Lamb*, 10 Hun, 348. Under a lease, which provides that an assignment without the landlord's consent should terminate the lease, an affidavit that he had assigned, without averring it done without landlord's consent, is insufficient. *Chretien v. Doncy*, 1 N. Y. 419. Proceedings were held void where affidavit did not show premises in the jurisdiction of the justice, nor that the affiant was the landlord. *Cuyler v. Crane*, 25 Hun, 67. An affidavit is sufficient if it alleges the making of the lease, the length of the term, the rent, the assignment of the lease to defendants, their occupation, non-payment of rent, and the demand and notice. *People v. Fowler*, 1 Hun, 104, n., appeal dismissed, 55 N. Y. 675. It is not necessary to show that the demand of rent was made by the landlord. it may be made by his agent. *People v. Stuyvesant*, 1 Hun, 102. If the notice of demand for rent is in writing, it must be in the alternative, requiring payment or possession. *People v. Gross*, 50 Barb. 231. Demand by landlord of an under-tenant is not sufficient, it must be made of tenant. *People v. Platt*, 43 Barb. 116. It is incumbent on the landlord to establish, by affidavit, that the rent has become due and payable, that its payment has been demanded, and default made. If it is stated demand was made at tenant's place of business of his agent, it must state who the agent is, or the nature of his agency. *Wolcott v. Schenck*, 16 How. 449. The affidavit should name the person of whom the rent was demanded. *Rogers v. Lynds*, 14 Wend. 172. A lessor is not bound to recognize a general assignee for benefit of creditors, as tenant, and demand of rent may be made of the tenant. *Bokee v. Hammersley*, 16 How. 461. A demand of rent with interest does not invalidate the proceedings. Interest is an incident of the debt, and the landlord is entitled to it from time of default. *People v. Dudley*, 58 N. Y. 323. Where an affidavit has

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been used in a proceeding in which a verdict was had, it cannot be again used as the foundation for a new proceeding, and if so used, the landlord and judge are liable in trespass. *McCoy v. Hyde*, 8 Cow. 68. In cases of holding over, where the real estate has been sold under execution, and the party against whom proceedings are instituted holds under the judgment debtor under title subsequent to the lien of the judgment, that fact must distinctly appear in the affidavit. *Hallenbeck v. Gardner*, 20 Wend. 22. Every fact necessary to give jurisdiction should be alleged in the petition. *Hallenbeck v. Gardner*, 20 Wend. 22; *Campbell v. Mallory*, 22 How. 813; *Powers v. Witty*, 42 id. 352. A verification need not be in the exact words of the statute, a substantial compliance is sufficient. *Bozughen v. Nolan*, 53 How. 485.

A petition which does not show that three days have expired since service of the alternative notice is premature and insufficient to confer jurisdiction. *Bristed v. Harrell*, 20 Misc. 348, 43 Supp. 918. Where a petition alleged that certain persons held over as "assignees or under-tenants," *held*, that this is a mere designation of the nature of the possession. *Drummond v. Fisher*, 43 St. Rep. 135, 16 Supp. 867. Allegations that the petitioner became the owner by a deed and that the tenant is in possession under an alleged agreement from the grantor of such deed are sufficient to show relation of landlord and tenant. *Earle v. McGoldrick*, 15 Misc. 135, 36 Supp. 803, 71 St. Rep. 825. The use of the word "lessee" in an allegation of the petition that the petitioner is the "lessee or landlord" is clearly a clerical error, and may be disregarded as surplusage.—Sup. Ct. 1898. *Fox v. Held*, 24 Misc. 184, 52 N. Y. Supp. (86 St. Rep.) 724. Where the petition does not contain a sufficient description of the premises, the justice does not obtain jurisdiction. *Wands v. Robarge*, 24 Misc. 273, 53 Supp. 700, 87 St. Rep. 700. Unless there is a joinder of issue by the service of a verified answer, or by an answer which can be held to be a waiver of a verified answer, the fact that the tenant appeared on the return day and raised no objection is not a waiver of a failure to verify the petition. *Wands v. Robarge*, 24 Misc. 273, 53 Supp. 700, 87 St. Rep. 700.

Where there was a failure to insert the date in a verification to a petition of summary proceedings, it will be assumed that the date of verification of the petition was the date on which it was

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used, and on which the precept was issued. *Griffin v. Barton*, 20 App. Div. 512, 27 Supp. 121. Unless issue has been joined by the filing of a verified answer, or by an answer which can be held to be a waiver of a verified answer, the appearance of defendant on return day of precept without objecting to the proceeding is not a waiver of the failure of landlord to verify the petition, nor of other facts going to question of jurisdiction, and the judgment, although void and defective in form, may be made the subject of an appeal by the tenant to the end that the errors may be corrected. *Wands v. Robarge*, 24 Misc. 273. For a verification which the court seems to think defective, see *Griffin v. Barton*, 22 Misc. 229. Section 2235 does not require that the petition should name the tenant. It is sufficient that the person against whom the proceeding is instituted is intelligibly designated, and the words "John Doe" and "Richard Roe," "under-tenants," is a sufficient compliance with the statute. *Ash v. Purnell*, 26 Abb. N. C. 92, 19 Civ. Pro. 234, 16 Daly, 189, 11 Supp. 54, 32 St. Rep. 306. The petition alleged a leasing of the premises for one year, but that defendant was in possession as under-tenant of the lessee and that defendant held over after the expiration of the term; *held*, sufficient to confer jurisdiction. *Ward v. Burgher*, 90 Hun, 540, 35 Supp. 961, 70 St. Rep. 635. A petition by the purchaser of real property at a sale under foreclosure by advertisement must allege that the mortgage contained a power of sale and that the mortgage had been recorded in the county wherein the property was situated. *Cowdrey v. Turner*, 85 Hun, 451, 32 Supp. 889, 66 St. Rep. 207. A petition which states that the petitioner was "in the peaceable possession and occupancy of the premises" and "lawfully entitled to remain and continue in possession thereof," when made under § 2235, is not sufficient. It must contain a description of the premises of which possession is claimed. *Snider v. Leichman*, 57 Hun, 561, 19 Civ. Pro. 217, 11 Supp. 434, 33 St. Rep. 351. Objection that the petition is not sufficiently definite as to the time of letting is waived when the tenant goes to trial and litigates the issues. *Wyckoff v. Frommer*, 12 Misc. 149, 33 Supp. 11, 66 St. Rep. 511. An allegation in the petition that the petitioner became the owner of the premises by deed from the life tenant and that the defendant was in possession under an alleged agreement for hiring made with the life tenant is sufficient to show relation of

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landlord and tenant between the parties to the proceeding. *Griffin v. Barton*, 22 Misc. 229. Where the petition in summary proceedings alleges that the petitioner, when evicted from the peaceable possession of the premises, which he held "by virtue of a certain arrangement or agreement made and entered into between himself and Julia Ross as lessee of said entire premises (of which the floor occupied by your petitioner as aforesaid forms a part), by the terms of which agreement your petitioner became duly entitled to and went into possession of the floor occupied by him as aforesaid," fails entirely to comply with the provisions of § 2235 of the Code requiring such petition to describe the premises "and the interest therein of the petitioner." Such petition confers no jurisdiction, and the objection that it does not confer jurisdiction may be made after answer. *Potter v. New York Baptist Mission Soc.*, 23 Misc. 671.

Service of notice to quit is not invalid because the original and not a copy thereof was served. Service may be made by any person having the authority of the landlord, and an affidavit of service of such notice need not be attached to the petition, but the service must be proved by the common-law evidence. Due notice to quit in the case of a monthly tenant is five (5) days, and the notice to quit in the case of a tenancy at will need not terminate at the end of the month. *Simpson v. Masson*, 11 Misc. 351, 32 Supp. 136, 65 St. Rep. 278, distinguishing *Posson v. Dean*, 8 Civ. Pro. 177. Notice of the termination of tenancy as basis of summary proceedings for holding over, under chap. 303, Laws of 1882, need not be served upon sub-tenant. *Decker v. Sexton*, 19 Misc. 59, 77 St. Rep. 167, 43 Supp. 167. A petition is defective by reason of the failure of the notary to sign the jurat, and confers no jurisdiction when there is no appearance, and judgment rendered thereupon is void absolutely. *Marchand v. Haber*, 16 Misc. 319, 37 Supp. 950, 73 St. Rep. 569. A petition which alleged a verbal letting on or about November 1st for the term of one month is not sustained by proof of an oral agreement in April from month to month "as long as the rent is paid." *Hoffman v. Van Allen*, 3 Misc. 99, 51 St. Rep. 603, 22 Supp. 369. Where a tenant from month to month, gives notice of his intention to quit at the end of the month the landlord need not give five days' notice to quit in order to entitle him to remove a tenant for holding over. *Hoske v. Gentzlinger*, 37 Supp. 647, 87

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Hun, 3. Assuming that a month's notice is not necessary in case of a simple tenancy from month to month, yet it is necessary where the tenancy is from month to month "so long as the rent is paid." *Hoffman v. Van Allen*, 22 Supp. 369, 3 Misc. 99, 51 St. Rep. 603. Where a tenant is in possession under an indefinite monthly hiring and pays rent in advance, the most that can be inferred on the subject of notice to terminate is that a reasonable notice should be given. *Ludington v. Garlock*, 55 Hun, 612, 9 Supp. 24, 29 St. Rep. 600.

Notice to a monthly tenant to vacate which contains no warning that on his failure to do so summary proceedings will be taken against him is not a substantial compliance with chapter 303 of the Laws of 1882, relative to five days' notice before the expiration of the term. *Folz v. Shalow*, 16 Supp. 942.

Precedent for Form of Notice to Quit in Tenancies at Will or Sufferance.

To HENRY SLATER, *tenant*:

Please take notice that you are hereby required to quit, surrender, and deliver up possession of the rooms on first floor in premises known as No. 243 Crown Street, in the city of Troy, and to remove therefrom on the 1st day of May, 1887, pursuant to the provisions of the statute relating to the rights and duties of landlord and tenant.

Dated Troy, April 1, 1887.

MICHAEL HOWARD,
Landlord.

A notice of thirty days, given during a calendar month which contains but thirty days, is held to be a month's notice within the meaning of the statute. *McGuire v. Ulrich*, 2 Abb. 28. The demand of rent may be made by an agent as well as by the landlord himself, and interest thereon may also be demanded at the same time. *People v. Stuyvesant*, 1 Hun, 102; *People v. Dudley*, 58 N. Y. 323. A tenant for a year, holding over, need not be served with a month's notice to quit. He is not within the meaning of the statute a tenant at sufferance. *Rowan v. Lytle*, 11 Wend. 616. Nor is a tenant for life, who holds over after the determination of the life estate, entitled to notice to quit. *Livingston v. Tanner*, 14 N. Y. 64. Tenants from year to year are tenants at will, and one month's notice is sufficient to them, as is said in *Wright v. Mosher*, 16 How. 454. And in *Park v. Castle*, 19 id. 30, it is held that such a tenant may proceed against

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without notice, as holding over his term at the expiration of the year. Whenever the holding over has been such, after the expiration of the term and under such circumstances as to indicate consent on the part of the landlord, notice is necessary. *Schuyler v. Smith*, 51 N. Y. 309; *Rowan v. Lytle*, 11 Wend. 616; *Smith v. Littlefield*, 51 N. Y. 539.

Where premises are rented from month to month, a month's notice to quit is not necessary. *People v. Schackno*, 48 Barb. 551; *People v. Goclet*, 64 id. 476. Where a tenant holds for an indefinite period, and with no rent reserved, he is a tenant at will; and also where the agreement is specific that he shall quit possession at the demand of the landlord; and therefore a month's notice to quit may be given in either case. *Nichols v. Williams*, 8 Cow. 13; *Post v. Post*, 14 Barb. 253; *Sarsfield v. Healy*, 50 id. 245. The notice takes effect thirty days after service, and the naming of a day on which the time will expire less than thirty days after service of the notice does not vitiate it. *Burns v. Bryant*, 31 N. Y. 453. But the notice must be plain and explicit, as well as precise and definite in its terms. *People v. Gedney*, 15 Hun, 475. The notice to quit must be given by the person holding the legal title to the premises; the holder of a contract of sale cannot give a valid notice, nor can a purchaser who has not obtained his deed. *Reeder v. Sayre*, 70 N. Y. 180.

Precedents for Preliminary Notice to Quit.

Michael Howard, owner,	}
<i>agst.</i>	
Henry Slater, and all persons occupying the premises hereinafter described.	

Please take notice that I am the owner of the premises known as No. 151 State Street, in the city of Troy, having purchased the same at an execution sale against Samuel Spencer, and having received my deed thereon and perfected my title thereunder, and that I require all persons occupying said property to quit the same on the 1st day of May, 1887, pursuant to the provisions of the Code of Civil Procedure, and fail not, under the pains and penalties of the law.

Dated, Troy, April 1, 1887.

MICHAEL HOWARD,
Owner.

To HENRY SLATER, and all other persons occupying the said premises.

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Michael Howard, owner,

agst.

Henry Slater, and all persons occupying the premises hereinafter described.

Please take notice that I am the owner of the premises known as No. 89 Washington Avenue, in the city of Troy, having purchased the same at a foreclosure sale thereof, and having received my deed thereon, and perfected my title thereunder, I require all persons occupying said property to quit the same on the 1st day of May, 1887, pursuant to the provisions of the Code of Civil Procedure, and fail not, under the penalties of the law.

Dated New York, April 1, 1887.

MICHAEL HOWARD,
*Owner.**To HENRY SLATER, and all other persons occupying the said premises.*

A notice to quit served by the original landlord after he has parted with the title to the premises is insufficient as a basis for summary proceedings brought by his grantee. *Griffin v. Barton*, 22 Misc. 228, 49 Supp. 1021, 83 St. Rep. 1021.

The demand of rent to furnish a basis for summary proceedings must be personal; and where the only demand was by mail, and there has been no service of the alternative three days' notice, the proceedings cannot be maintained. *Zinsser v. Herrman*, 23 Misc. 645, 52 Supp. 107, 86 St. Rep. 107.

Form of Notice where Farm is Worked on Shares.*To HIRAM GARRISON, and all other persons occupying the said premises:*

Thomas Harnden, owner,

agst.

Hiram Garrison, and all other persons occupying the premises hereinafter described.

Please take notice that I am the owner of the farm known as "The Broadhead farm," situate in the town of Ulster, in the county of Ulster, and State of New York, and described as follows: (here insert description) which farm you, the said Hiram Garrison, now occupy and hold, under an agreement with me to cultivate it upon shares, and the time fixed in the agreement for the occupancy of the said Hiram Garrison having expired, I do hereby require all persons occupying the said property to quit the same on the 5th day of May, 1887, pursuant to the

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provisions of the Code of Civil Procedure, and fail not, under the pains and penalties of the law.

Dated April 2, 1887.

THOMAS HARNDEN,
Owner.

Form of Notice to Squatter.

To HENRY RIGHTMYER :

Please take notice that I am the owner of a piece or parcel of land known as No. 312 Washington Avenue, in the city of Kingston, described as follows: (insert description) upon which you have intruded, or squatted upon, and that I require you to quit the said premises on or before the 1st day of November, 1886, pursuant to the provisions of § 2232 of the Code of Civil Procedure, and that any permission heretofore given to occupy the same is hereby revoked.

Dated September 28, 1886.

CHARLES G. CHALMERS,
Owner.

Precedent for Notice to Quit—Non-payment of Rent.

To JOHN HESS, *tenant* :

You will please take notice that you are indebted to me in the sum of \$100 for one month's rent of the premises 350 Washington Avenue, in the city of Albany, being rent from July 1, 1886, to August 1, 1886; and that I require the payment of said rent on or before the 5th day of August, 1886, or the possession of the premises.

Dated August 2, 1886.

HENRY RUTZER,
Landlord.

Form of Notice by Neighbor Requiring Landlord to Prosecute.

To HENRY FRENCH :

Please take notice that I am the owner of the premises No. 56 Liberty Street, in the city of Utica, in the immediate neighborhood of your house, No. 60 Liberty Street, said city, and that your said house is occupied and used as a bawdy-house, and that I require you to make application for the removal of the person so using and occupying the same. In case you do not make such application within five days after the service upon you of this notice; or, having made it, do not in good faith diligently prosecute it, I will, by virtue of § 2237 of the Code of Civil Procedure, make and prosecute such application, to the end that said nuisance may be abated.

SAMUEL HAYES.

Form of Petition by Landlord for Non-payment of Rent on Service of Notice.

To Hon. WILLIAM S. KENYON, *County Judge of Ulster County* :

The subscriber applies for process and proceedings to remove John

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Doyle, the tenant and occupant of the premises hereinafter described, on the ground set forth in the following petition.

Dated Kingston, May 5, 1886.

DANIEL GREENE.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

The petition of Daniel Greene respectfully shows and alleges, that he is the landlord of the premises hereinafter mentioned, and that, as such, he entered into an agreement with John Doyle, as tenant, and that by the terms of the said agreement the said tenant hired from your petitioner, as such landlord, the four rooms on the first floor in the dwelling situated at No. 47 Harris Street, in the city of Kingston, and he, the said tenant, in and by the said agreement, undertook and promised to pay your petitioner, as rent, the sum of \$40 per month, payable monthly in advance, for the use and occupation of said premises; that on the 1st day of May, 1886, there was due, under and by virtue of said agreement, the sum of \$40, for one month's rent of the premises, before described, to wit: from the 1st day of May, 1886, to the 1st day of June, 1886; and your petitioner further says, that he has demanded the said rent from the said tenant, since the same became due, by the service of a notice in writing upon the said tenant, on the 20th day of May, 1886, pursuant to the statute, requiring the payment of the said rent, so due, as aforesaid, within three days thereafter, or the possession of said premises; and which notice was served upon the said tenant, by delivering to the said John Doyle a copy of such notice, and, at the same time, showing him the original, which said service was made on the premises, at ten o'clock A. M. on said day; that the said tenant has made default in the payment thereof, pursuant to the agreement under which the premises are held; and that the said tenant holds over and continues in possession of the same, without permission of your petitioner, after default in the payment of rent as aforesaid. Therefore, your petitioner prays for a final order to remove the said John Doyle from said premises. And your petitioner will ever pray.

Dated Kingston, May 25, 1886.

DANIEL GREENE.

(Add verification as to pleading.)

Precedent for Petition on Expiration of Term.

To Hon. WILLIAM S. KENYON, County Judge of Ulster County :

The subscriber applies for process and proceedings to remove Richmond DuBois, the tenant and occupant of the premises hereinafter described, on the grounds set forth in the following petition.

Dated April 1, 1886.

PETER PHILLIPS.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

The petition of Peter Phillips respectfully alleges and shows, that he is the landlord of the premises hereinafter described, and that on or

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about the 1st day of March, 1885, he rented to Richmond DuBois the third floor of premises No. 59 James Street, in the city of Kingston, for the term of one year from March 1, 1885, which said term has expired, and that the said tenant holds over and continues in possession of the said premises, without the permission of your petitioner, after the expiration of the tenant's term therein. Therefore, your petitioner prays for a final order to remove the said Richmond DuBois from said premises. And your petitioner will ever pray.

Dated Kingston, April 1, 1886.

PETER PHILLIPS.

(Add verification as to pleading.)

Precedent for Petition for Removal of Tenant at Will or Sufferance.

(Application same as above.)

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

The petition of Mark Van Cott respectfully alleges and shows, that on or about the 1st day of September, 1882, your petitioner let and rented unto Simon Brink, during the will and pleasure of your petitioner, the house and premises known as No. 175 Chambers Street in the city of Kingston; and that the said Simon Brink has held and occupied the said premises as the tenant at will of your petitioner, until the expiration of such tenancy as hereinafter mentioned. And your petitioner further alleges that he caused notice in writing to be served on the said Simon Brink (here state the manner of service) on the 1st day of October, 1882, requiring the said Simon Brink to remove from the said premises on or before the 1st day of November, 1882; that the time within which the said Simon Brink was required so to remove has expired; and that the said Simon Brink holds over and continues in possession of said premises after the expiration of such time without the permission of your petitioner, his landlord. Therefore, your petitioner prays for a final order to remove the said Simon Brink from said premises, and your petitioner will ever pray.

Dated Kingston, November 2, 1882.

MARK VAN COTT.

(Add verification as to pleading.)

Precedent for Petition by Purchaser at Mortgage Foreclosure.

To the County Court of Ulster County :

The petition of Amasa Humphrey respectfully shows to this court : That on the 14th day of June, 1886, your petitioner became the purchaser of the real property hereinafter described at a sale thereof, duly made upon the foreclosure of a mortgage by proceedings taken as prescribed in title 9, of chap. 17, of the Code of Civil Procedure, which said mortgage was dated May 5, 1883, and was executed by John Burns and Julia, his wife, to your petitioner, and described said prop-

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erty ; that the title of your petitioner under the said foreclosure has been duly perfected ; that said John Burns holds over and continues in possession of said real property after a notice to quit has been given pursuant to § 2236 of Code of Civil Procedure, in behalf of your petitioner, requiring all parties or persons occupying said property to quit the same by the 9th day of February, 1887, which said notice was served personally upon the said John Burns, on the 8th day of January, 1887, and after the perfecting of title as aforesaid.

That your petitioner owns said property in fee. (Insert description.)

Wherefore, your petitioner prays for a final order to remove said John Burns from said real property according to the provision of title 2, chap. 17, of Code of Civil Procedure.

(Dated.)

(Signatures.)

(Add verification as to pleading.)

Petition for Precept for Farm Let on Shares.

To CHARLES M. HADDEN, Esq., Justice of the Peace in the town of Hardenburgh, in the county of Ulster, New York :

The petitioner named below hereby applies for process and proceedings to remove Clarence Johnson from the possession of the premises hereinafter mentioned, on the ground set forth in the following petition.

GEORGE GARRISON.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

The petition of George Garrison respectfully shows that, at the time of making of the agreement hereinafter mentioned, your petitioner was the owner of the farm known as the "Johnson farm," situate in the town of Hardenburgh, in the county of Ulster, in the State of New York, and described as follows, to wit (here insert description) : That being such owner, your petitioner did on the 1st day of April, 1883, enter into an agreement with Clarence Johnson, whereby said Johnson agreed with your petitioner to cultivate the said property upon shares for the term of one year, which term expired on the 1st day of April, 1884, and that after the expiration of said term, to wit: on the 4th day of April, 1884, a notice in writing in behalf of your petitioner, requiring all persons occupying the said property, to quit the same on the 15th day of April, 1884, was duly served upon the said Clarence Johnson (here state mode of service), and that notwithstanding the expiration of the time fixed in said agreement, and of the expiration of the term and of the time specified in said notice, the said Clarence Johnson holds over and continues in possession of the said premises without the permission of your petitioner. Wherefore, your petitioner prays for a final order to remove the said Clarence Johnson from said premises, and your petitioner will ever pray.

Dated April 16, 1884.

GEORGE GARRISON.

(Add verification as to pleading.)

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Precedent for Petition to Remove Squatters.

To Hon. WILLIAM S. KENYON, County Judge of Ulster County :

The subscriber applies for process and proceedings to remove Lawrence Jennings, the tenant and occupant of the premises hereinafter described, on the grounds set forth in the petition.

JAMES BARD.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

The petition of James Bard respectfully alleges and shows, that he is the owner in fee-simple (or state the nature of the estate held by the petitioner) and entitled to the possession of (here describe the property) in the city of Kingston.

Your petitioner further alleges and shows, that Lawrence Jennings did, contrary to law and without the permission of your petitioner, or anybody authorized to give such permission, intrude into and squat upon the said parcel of land, and that he still squats upon and holds possession of said land and premises without the permission of your petitioner, and has refused and still refuses to remove therefrom.

Your petitioner further shows, that on the 3d day of June, 1886, a notice in writing in behalf of your petitioner, requiring all persons occupying the said property to quit the same on or before the 5th day of July, 1886, has been served upon the said Lawrence Jennings by (here state the mode of service), and that the said Lawrence Jennings holds over and continues in possession of the said property after such notice to quit has been given, and after the expiration of the time therein specified, and refuses to remove therefrom, and that said holding over is without the permission of your petitioner. Wherefore, your petitioner prays for a final order to remove the said Lawrence Jennings from said premises, and your petitioner will ever pray.

Dated Kingston, July 6, 1886.

JAMES BARD.

(Add verification as to pleading.)

Precedent for Form of Petition for Forcible Entry and Detainer.

To Hon. WILLIAM S. KENYON, County Judge of Ulster County :

The petition of Joseph G. Krom, of the city of Kingston, Ulster County, respectfully shows that he is the owner in fee of the premises hereinafter mentioned, and that before and on the 28th day of November last, and thence hitherto, he as such owner was in the lawful, actual, and peaceable occupation and possession of said premises, to wit: (here insert description of property).

That while your petitioner was so in such lawful, actual, peaceable occupation, and on or about the day and year last aforesaid, certain persons, among others James Dunnigan and Frank Banks, did unlawfully, and against the will of your petitioner, make an unlawful and forcible entry into and upon said premises with a strong hand, and multitude of

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men, and did then and there unlawfully and forcibly eject and expel your petitioner and his family, employes and agents, from said premises, and, in like manner, on said 28th day of November last, and on divers days and times since the said 28th day of November, did hold the possession of said premises by force, and that the said James Dunnigan and Frank Banks have ever since held, and still unlawfully and forcibly hold in like manner, your petitioner and his family out of possession of said premises, contrary to the form of the statute in such case made and provided. Your petitioner, therefore, prays for a final order to remove the said James Dunnigan and Frank Banks from the possession of said premises.

Dated Kingston, December 13, 1886.
(Add verification.)

JOSEPH G. KROM.

Precedent for Petition—Bawdy-House.

To HON. WILLIAM S. KENYON, *County Judge of Ulster County*:

The subscriber applies for process and proceedings to remove John Doyle, the tenant and occupant of the premises hereinafter described, on the grounds set forth in the following petition.

Kingston, May, 23, 1886.

DANIEL GREENE.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

The petition of Daniel Green respectfully alleges and shows that he is the landlord of the premises hereinafter mentioned; that on or about the 1st day of September, 1885, deponent entered into an agreement with John Doyle as tenant, by the terms of which agreement the said tenant hired from your petitioner, as landlord, the dwelling-house situated and known as No. 47 Harris Street, in the city of Kingston, for the term of one year from September 1, 1885, at an agreed rental; that the said tenant entered into the occupation of said premises and is now in possession and occupation of the same. The said premises are now being used and occupied by the said tenant (and by other persons connected with him therein, whose names your petitioner cannot ascertain), as a bawdy-house and house of assignation for lewd persons, for purposes of prostitution and as a place of resort for such persons for similar purposes, contrary to the statute of the State of New York, in such case made and provided, and that the said tenant continues in possession of the same, and uses and occupies said premises as such bawdy-house and house of assignation, in violation of the law and without the permission of the landlord. Therefore, your petitioner prays for a final order to remove the said John Doyle from said premises. And your petitioner will ever pray.

DANIEL GREENE.

Dated Kingston, May 25, 1886.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss.:

Daniel Greene, being duly sworn, says that he is the petitioner above mentioned, and that the foregoing petition is true to his own knowledge,

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except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

DANIEL GREENE.

Sworn to before me,)

May 25, 1886.)

JOHN RIDER,

Notary Public, Ulster County.

ARTICLE VI.

PRECEPT, AND HOW SERVED. §§ 2238, 2239, 2240, 2241, 2242, 2243.

§ 2238. Precept.

The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition, as being in possession of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than three nor more than five days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

§ 30, R. S., am'd; L. 1851, ch. 460; L. 1863, ch. 828, § 1 (7 Edm. 355).

§ 2239. Id.; in New York City.

In the city of New York, where the application is made to a district court, the petition must be filed with, and the precept must be issued by, the clerk of the court; and the precept must be made returnable before the court, at the place designated, pursuant to law, for holding the court; and all subsequent proceedings in the cause must be had at that place, except as otherwise prescribed in § 2246 of this act. If, upon the return of the precept, or upon an adjourned day, the justice is unable, by reason of absence from the court-room, or sickness, to hear the cause, or it is shown by affidavit that he is for any reason disqualified to sit in the cause, or is a necessary and material witness for either party, a justice of any other district court of the city may act in his place at the same court-room.

L. 1863, ch. 189 (6 Edm. 86); Co. Proc. § 66; L. 1876, ch. 356, § 1; L. 1877, ch. 187, § 1. See § 3208.

§ 2240. Id.; how served.

The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the Supreme Court, in an action against the corporation, might be served, a copy of the precept, and at the same time showing him the original.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made

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by delivering a copy thereof at his dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can, with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable.

§ 32, R. S.; L. 1857, ch. 684, and L. 1868, ch. 828 (7 Edm. 356).

§ 2241. Duty of persons to whom copy of precept is delivered.

A person, to whom a copy of a precept, directed to another, is delivered, as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city; or, if he cannot be so found, to his agent therein; and if neither can be so found, after the exercise of reasonable diligence, before the time when the precept is returnable, to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable, after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city. A person, who wilfully violates any provisions of this section, is guilty of a misdemeanor; and, if he is a tenant upon the property, forfeits to his landlord the value of three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed.

L. 1868, ch. 828, § 3 (7 Edm. 356); and 1 R. S. 748, § 27 (1 Edm. 699).

§ 2242. When precept to be served on landlord of bawdy-house, etc.

Where the case is within § 2237 of this act, the precept must be directed to and served upon the owner or landlord, or his agent, and also upon the tenant or occupant of the property. Either or both of them may, upon the return day, appear and show cause why the tenant or occupant should not be removed from the property.

Parts of §§ 63 and 64; L. 1868, ch. 764 (7 Edm. 336).

§ 2243. Proof of service of precept.

At the time when the precept is returnable, the petitioner must, unless the adverse party appears, make due proof of the service thereof, showing the time, and the place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence. Where service is made by a sheriff, constable, or marshal, it may be proved by his certificate, stating the facts.

§ 33, R. S.; also § 32, am'd; L. 1868, ch. 828 (7 Edm. 336).

The summons need not show that the premises are situated within the judicial district in the city of New York in which the proceedings are instituted, it is sufficient if it properly describe the premises. *People v. Kelly*, 20 Hun, 549. The summons must

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be directed to the tenant or occupant by name, and where the direction was left in blank, the proceedings were held to be defective, though service was made upon the proper party, and an appearance by the tenant, for the purpose of objecting, is not a waiver of the defect. The premises too must be properly described. *Cunningham v. Goelet*, 4 Den. 71; *Hill v. Stocking*, 6 Hill, 314; *Deuel v. Rust*, 24 Barb. 438. Where the proceedings were instituted against two, both of whom were named in the affidavit, and the summons was directed to one of them, and "any other person in possession of the premises," and both appeared before the officer, made affidavit and had a trial by jury without objecting to the summons, it was held it was sufficient. *Sims v. Humphrey*, 4 Den. 185. In a case of holding over the term without permission, it was held that it is discretionary with the magistrate, when the summons is not issued on the same day the term expires, to make the summons returnable on any day within the five days. *Bushnell v. Ostrander*, 30 How. 93. But it is held, on the contrary, that a summons issued on the last day of the term may be made returnable on the same day, but not on the day following. *Luhrs v. Commors*, 30 Hun, 468. And the same rule is held in *People v. Lane*, 2 T. & C. 522. The summons in a proceeding by a claimant under a tax deed in Brooklyn should be returnable in not less than three days, nor more than five days; one returnable on the same day is unauthorized and confers no jurisdiction. *People v. Andrews*, 52 N. Y. 445. The summons should require the defendant forthwith to remove from the premises, or show cause why possession of the premises should not be delivered to the landlord. *Deuel v. Rust*, 24 Barb. 438. A summons, returnable on the day on which it was issued, gives no jurisdiction, except in case of holding over by a tenant after expiration of his term. *People v. Andrews*, 52 N. Y. 445. A summons issued on the 21st day of November, and returnable on the 25th, is returnable in not less than three nor more than five days, and is properly served on the 23d, at least two days before the return day. *People v. Marvin Safe Co.*, 5 Hun, 218. A clerical error in preparing the copy of the summons, so that it is made returnable at an earlier day than that specified in the original, will not render the proceedings nugatory where the tenant appears in accordance with the copy served, and makes no objection to the error, in such

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case the assent of the parties that the summons was returnable on the day specified will of itself confer jurisdiction, although the day specified in the original falls on Sunday. *Nemetty v. Naylor*, 100 N. Y. 562. The precept to dispossess a tenant holding over after the expiration of his term must be returnable not less than three days after its issue. It cannot be returnable the day after issue, and gives no jurisdiction. *Luhrs v. Commoss*, 13 Abb. N. C. 88. An error in the summons and judgment by which the premises appear larger than those described in the affidavit, and larger than those actually occupied, is clerical merely, and does no harm. *Warner v. Henderson*, 13 Week. Dig. 143. Where the summons was made returnable on December 10, which was Sunday, but in the copy served the return day was stated to be December 9, and on that day parties appeared and consented to proceed without any objection being taken on account of the mistake, *held*, that it was thereby waived, and the assent to proceed conferred jurisdiction, and the question could not be reviewed in a collateral proceeding. *Nemetty v. Naylor*, 100 N. Y. 562.

Precedent for Form of Precept.

Before Hon. William S. Kenyon, *County Judge*.

James Mayor
<i>agst.</i>
George Jefferson.

The People of the State of New York, to GEORGE JEFFERSON, tenant above named :

You are hereby required forthwith to remove from the premises designated and described as follows, to wit : The dwelling situated and known as No. 29 Broad Street, in the city of Kingston, or to show cause before Hon. William S. Kenyon, county judge, at the court-room of said county judge, in the city of Kingston, on the 9th day of September, 1886, at ten o'clock in the forenoon of that day, why the possession of the said premises should not be delivered to the landlord.

Dated the 5th day of September, 1886.

WILLIAM S. KENYON,
Ulster County Judge.

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Precedent for Precept.

To JAMES DUNNIGAN, FRANK BANKS, and every person in possession of the premises hereinafter described, or claiming the possession thereof :

WHEREAS, Joseph G. Krom has presented to me his petition in writing, subscribed by him and duly verified by his oath, which said petition sets forth that he, the said Joseph G. Krom, is the owner of the premises hereinafter mentioned, and that on the 28th day of November last, he, as such owner, was in the lawful and actual possession and occupation of said premises, and while he was in such lawful and actual occupation, and on or about the day and year last aforesaid, you, the said James Dunnigan and Frank Banks, did make a forcible entry into and upon said premises, and did forcibly eject the said petitioner therefrom, and that you in like manner still hold the said petitioner out of the possession of the said premises, as by reference to said petition will appear : This, therefore, is to require you, and each of you, forthwith to remove from said premises, to wit : (here describe property) or show cause before me, county judge of Ulster County, at the chambers of the county judge, in the city of Kingston, on the 18th day of December, 1886, at one o'clock in the afternoon, why possession of said premises should not be returned to the said Joseph G. Krom, the petitioner.

Witness, Hon. William S. Kenyon, county judge of Ulster County, at said city of Kingston, December 14, 1886.

WILLIAM S. KENYON,

County Judge of Ulster County.

Precedent for Warrant.

To the Sheriff of the County of Ulster :

WHEREAS, Joseph G. Krom, by petition duly made and verified by him and presented to me, county judge of Ulster County, did allege and prove that he was peaceably in actual possession of (here describe property), and that James Dunnigan and Frank Banks, on the 28th day of November, 1886, with strong hand and a multitude of people, did make forcible entry into and upon said premises, and did wrongfully exclude the said Joseph G. Krom therefrom, and has ever since wrongfully held the said Joseph G. Krom out of possession of said property :

Whereupon, I issued a precept requiring the said James Dunnigan and Frank Banks forthwith to remove from the said premises, or show cause before me at a certain time, now passed, why the possession of the said premises should not be delivered to the said petitioner ; and no good cause having been shown, or any way appearing to the contrary, and due proof of the service of such precept having been made to me : Therefore, in the name of the people of the State of New York, you are commanded to remove the said James Dunnigan and Frank Banks, and all persons, from the said premises, and put the petitioner in full possession thereof.

In witness whereof, I have subscribed to these presents this 28th day of December, 1887.

WILLIAM S. KENYON,

County Judge of Ulster County.

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An affidavit that the copy was left with a person residing on the premises is insufficient, as not showing the absence of the defendant or that the copy was left with a proper person, as required by statute, and the service bad, if it fails to show the place where it was left is the plaintiff's residence. *Cameron v. McDonald*, 1 Hill, 512; *People v. Matthews*, 43 Barb. 168, affirmed, 38 N. Y. 451. It was held under the statute that the proof was insufficient where it was alleged the service was upon an under-tenant on the demised premises, and that the tenant was absent from his residence without stating that his residence was on the demised premises. *People v. Platt*, 43 Barb. 116. If the summons is directed to the original lessee, but served only on an under-tenant in person, the service is insufficient; it should be served on both. *Matter of Glenn*, 1 How. 213. A slight and immaterial variance between the original summons and the copy served, where the person is not misled thereby, will be disregarded. *People v. Flannigan*, 3 Week. Dig. 579. Where service is sworn to, as being of a date prior to the date of the summons itself, the variance is fatal; it is not a mere clerical error that may be corrected. *People v. Boardman*, 4 Keyes, 59. Service on the general agent of a corporation is sufficient. *People v. City of Troy*, 6 Alb. L. J. 326. An affidavit of service of summons on two absent tenants, showing that the service was made on both tenants by leaving one copy of the summons with a person of mature age and discretion, will not give jurisdiction. *People v. De Camp*, 12 Hun, 378. A return by the constable of service on the defendant personally, by leaving the original and delivering a copy thereof, is due proof of service. *People v. Lamb*, 10 Hun, 348. Personal service of a summons, out of the jurisdiction of the court or magistrate issuing it, is invalid. *Beach v. Bainbridge*, 7 Hun, 81. In summary proceedings under Laws of 1854, chapter 863, as amended by Laws of 1873, for possession of premises claimed under a tax sale, service of notice must be proved by common-law evidence; a copy of the notice with affidavit is not sufficient. *People v. Walsh*, 87 N. Y. 481. An objection to the regularity of the service of the summons, which is taken preliminarily and overruled, and an exception taken, is not waived by a subsequent appearance on the hearing. *People v. Fowler*, 2 Week. Dig. 560. And in *People v. Johnson*, 1 T. & C. 578, following 4 Denio, 71, it is held that an appearance for the sole purpose of objecting is

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not a waiver of any previous defects in the proceeding. An omission to show the original summons renders the service irregular. *Duell v. Rust*, 24 Barb. 438.

The constable who made the service may be sworn and testify to the facts relating thereto, even though he may have made a written return by affidavit, and if due service is proved by such evidence, that is sufficient to give jurisdiction. *Robinson v. McManus*, 4 Lans. 380. The certificate of the constable showing due service on the defendant personally, by showing the original and delivering a copy thereof to him, is due proof of the service thereof. *People v. Lamb*, 10 Hun, 348. If the return is defective, it may be amended at any time before judgment, and the power of amendment does not depend upon the appearance of defendant in the proceeding. The return to a precept in summary proceedings cannot be shown to be false in another action, for the purpose of defeating an action and rendering parties enforcing it trespassers. *Feickert v. Freisen*, 1 City Ct. 369. An affidavit that a summons was served "by affixing, and leaving so affixed, a true copy of the summons upon a conspicuous part of the premises, there being no person residing on or employed on said premises," is not sufficient, as it does not show that defendant had no residence in the city, or if he had one, that no person of suitable age or discretion upon whom service might be made could be found there. *Beach v. Bainbridge*, 7 Hun, 81. An affidavit in proceedings against one of service upon another named "residing on the premises," the first person being absent, is insufficient. *Cameron v. McDonald*, 1 Hill, 512. An affidavit of service which does not show that the copy was left with a person of mature age at the last or usual place of residence of the defendant, is defective. *People v. Matthews*, 43 Barb. 168, affirmed, 38 N. Y. 451. An affidavit which alleges service on an under-tenant on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence is on the demised premises, gives no jurisdiction. *People v. Platt*, 43 Barb. 116. A failure to appear admits the landlord's right, and precludes an objection on *certiorari* to the regularity of the proceedings. As to waiver by appearance, and other decisions as to service, see § 2240.

The petitioner must show method of service of the notice. A mere statement that the petitioner served, or had served the

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notice, is not sufficient. *Tolman v. Heading*, 11 App. Div. 264, 42 Supp. 217, 76 St. Rep. 217. When summary proceedings are commenced by service on one member of a firm of under-tenants, the other being absent from the city or confined by illness, such service is sufficient to give jurisdiction. *Ludwig v. Lazarus*, 10 App. Div. 62, 41 Supp. 773, 75 St. Rep. 1169. Affidavit of service of precept by delivering to the tenant should state that a copy of § 1224 was indorsed thereon. *Rathbun v. Weber*, 13 Civ. Pro. 50.

An appearance by attorney in summary proceedings constitutes a waiver of irregularity of service of process. *Cochrane v. Reich*, 20 Misc. 593, 46 Supp. 441.

Precedent for Proof of Personal Service.

ULSTER COUNTY, ss. :

John Glennon, of the city of Kingston, said county, being duly sworn, says that he did, on the 24th day of December, 1886, at ten o'clock in the forenoon, at No. 76 Crown Street, in the said city, serve the within precept on Norman Garrison, the tenant therein named, by delivering to him personally a true copy thereof, and at the same time showing him the original, and that deponent is twenty-one years of age and upwards.

(*Jurat.*)

(Signature.)

Precedent for Proof of Service on Person of Mature Age.

ULSTER COUNTY, ss. :

John Glennon, of the city of Kingston, said county, being duly sworn, says that he did, on the 13th day of August, 1886, at 11 o'clock and 45 minutes in the forenoon, serve the within precept on Henry Briggs, the tenant therein named, by leaving a true copy thereof at his dwelling-house, No. 137 James Street, in the said city, with George Simpson, who is a person of suitable age and discretion, who, at the time of the said service, was on, and who resides on the said premises, at the same time showing him the original ; and that the said Henry Briggs, tenant, was, at the time of such service, absent from his said dwelling-house and residence, and that a copy of § 2241 of the Code of Civil Procedure was indorsed on the copy precept so served.

(*Jurat.*)

(Signature.)

Precedent for Proof of Service in Conspicuous Place.

ULSTER COUNTY, ss. :

Charles Link, of the city of Kingston, said county, being duly sworn, says that he did, on the 4th day of April, 1887, at four o'clock in the afternoon, serve the within precept on Mary Bannon, tenant

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therein named, by affixing the same on a conspicuous part of the premises within described, to wit (here describe property and place of affixing notice), and that the said Mary Bannon was absent from said premises at the time of said services, and that said premises are her dwelling-house and place of residence, and that there was no person residing or employed on said premises at the time of said services, and that a copy of § 2241 of the Code of Civil Procedure was indorsed on said copy precept.

(*Jurat.*)

(Signature.)

ARTICLE VII.

ANSWERS AND DEFENCES. §§ 2244, 2245.

§ 2244. [Am'd, 1893.] Answer.

At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may file with the judge or justice who issued the precept, or with the clerk of the court, a written answer, verified in like manner as a verified answer in an action in the Supreme Court, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action.

L. 1893, ch. 705.

§ 2245. Issues upon forcible entry or detainer.

Where the application is founded upon an allegation of forcible entry or forcible holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property, at the time of a forcible entry, or in constructive possession, at the time of a forcible holding out; and the adverse party must either deny the forcible entry, or the forcible holding out, or allege, in his defence, that he, or his ancestor, or those whose interest he claims, had been in quiet possession of the property, for three years together next before the alleged forcible entry or detainer; and that his interest is not ended or determined, at the time of the trial.

Id. §§ 6 and 11, am'd.

As to whether the legislature intended by the enactment of § 2235 to require proof of the matters so required to be alleged in addition to those specified in § 2245, query. *Potter v. N. Y. Baptist Mission Soc.*, 23 Misc. 673.

The denial in the defendant's affidavit should be expressed and positive, and not circumstantial and argumentative. *Niblo v. Post's Administrators*, 25 Wend. 284. But it is sufficient if in general terms it denies each and every allegation contained in the affidavit of the landlord. *People v. Coles*, 42 Barb. 96. Where two tenants hold under a joint demise to both, the affidavit of one of them, that the rent has not been demanded of him, does

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not raise an issue demanding a jury. *Geisler v. Acosta*, 9 N. Y. 227. The allegations in the landlord's affidavit, not denied, will be deemed true. *People v. Teed*, 48 Barb. 424; *McGuire v. Ulrich*, 2 Abb. 28. An affidavit which attempts to show a former adjudication must show what issue was joined, and on what ground judgment was given. *Geisler v. Acosta*, 9 N. Y. 227. The tenant must put in a verified answer; as the Code now stands a counter-affidavit cannot be accepted as a valid plea. *Yuclin v. Meade*, 1 McCarty's Civ. Pro. 446. Judgment by default may be entered at the return of the summons; the justice is not obliged to wait an hour as in civil actions. *Mordant v. Miles*, 1 Abb. N. C. 300. The tenant is estopped from disputing his landlord's title when the conventional relation exists. *People v. Kelsey*, 38 Barb. 269; *Spraker v. Cook*, 16 N. Y. 567. But he may show that such title has terminated, either by its own limitation, or by conveyance, or by operation of law. *Jackson v. Davis*, 5 Cow. 123; *Buck v. Binninger*, 3 Barb. 391; *Capex v. Parker*, 3 Sandf. 662; *Despard v. Walbridge*, 15 N. Y. 374. On sale under execution, if judgment and execution are regular on their face, it is sufficient. *Brown v. Betts*, 13 Wend. 29. Nor, under the same case, can a tenant show a breach of landlord's agreement to construct premises in a proper manner. Where a landlord is bound by covenants for quiet enjoyment, which would be violated by dispossessing the tenant, this constitutes a defence. *Buck v. Binninger*, 3 Barb. 391. The under-tenant has a right to deny the non-payment of rent by the tenant, and to controvert the allegations of the landlord, and to a trial of the issues so raised. *People v. Callahan*, 8 Week. Dig. 297. The rule that a tenant cannot dispute the title of his landlord does not apply to a case where a person in possession denies the facts on which the precept is issued. He may show that the alleged lease was executed under and in pursuance of a usurious agreement and is void, so that the relation of landlord and tenant does not exist. *People v. Howlett*, 76 N. Y. 574. Fraud in obtaining an alleged lease is not an issue to be tried in summary proceedings. *Becker v. Church*, 5 State Rep. 97; s. c. 42 Hun, 258. The discontinuance, on the landlord's motion, of summary proceedings on the trial of an issue as to tenancy is not an adjudication which bars a subsequent action for rent. *Gillilan v. Spratt*, 41 How. 27. As to how far sickness in the family of the

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tenant will be a defence to proceedings, see *Tuomy v. Dunn*, 42 N. Y. Super. 291. It is not competent for the tenant in these proceedings to show a breach of the landlord's agreement to construct the premises in a proper manner. *People v. Kelscy*, 14 Abb. 372. A counterclaim cannot be pleaded in these proceedings. *People v. Walton*, 2 T. & C. 533.

In summary proceedings by one claiming as landlord, the tenant not contesting the tenancy and the amount due, is not confined to a mere denial, he may set up matters which had been proved before a justice of the peace and the judgment, and may show that he occupied as equitable owner under an agreement with plaintiff. *Provost v. Donohue*, 21 St. Rep. 897, 3 Supp. 399. Counterclaim cannot be pleaded in summary proceedings of the failure to perform a covenant to repair, or alter or enlarge the demised premises, but under a general denial defendant may claim benefit of the clause of lease that provides for the apportionment of the rent after the time that tenant is deprived of the enjoyment of part of the premises in consequence of alterations and repairs by the landlord, but where such offset still leaves a balance due the landlord he is entitled to judgment for possession. *Durant Land Co. v. East River El. L. Co.*, 6 Supp. 659, 17 Civ. Pro. 224.

Where a lease contains a covenant to the effect that on giving a specified notice the lease shall continue in force for an additional term, the giving of the notice by the lessee creates the new term without the execution of a lease by the lessor, and will constitute a defence in any court to a proceeding instituted to dispossess the lessee during such new term. *Hausauer v. Dahlgman*, 72 Hun 607, 55 St. Rep. 139, 25 Supp. 277. The defence of eviction is available in summary proceedings. *Hamilton v. Graybill*, 19 Misc. 521, 43 Supp. 1079, 77 St. Rep. 1079.

A judgment in summary proceedings declaring petitioner entitled to possession is an adjudication that the relation of landlord and tenant exists, and will bar a subsequent action to avoid the lease on the ground that it was a mortgage. *Reich v. Cochran*, 74 Hun 551, affirmed, 151 N. Y. 122. It is no defence by the assignee of a lease that the tenant has paid all the rent due from the time of becoming tenant where there are arrearages of rent at the time he took the premises upon which the landlord applies his payments. *Collander v. Smith*, 20 Misc. 612, 45

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Supp. 1130, 26 Civ. Pro. 318; 79 St. Rep. 1130. An answer in summary proceedings against the assignee of a lease denying that he failed to pay "all rents becoming due from him to the petitioner" is neither a general nor a specific denial. *Colander v. Smith, supra*. The only answer authorized by statute is one denying the allegations of the petitioner. Anything else is surplusage and may be disregarded. *Bloom v. Huyck*, 71 Hun, 252, 54 St. Rep. 477, 25 Supp. 7. Damages to a tenant resulting from conversion of his chattels by the landlord are a proper subject of counterclaim in summary proceedings for non-payment of rent. *Burrell v. Do Sin*, 10 Misc. 745, 31 Supp. 804, 24 Civ. Pro. 243, 64 St. Rep. 612. An answer which makes a general denial and alleges that a new lease was made and that the rent has been paid under the new lease raises an issue. *Matter of Wright*, 42 St. Rep. 455, 16 Supp. 808. Plea of tender after the commencement of an action is not permissible. *Stover v. Chasse*, 9 Misc. 45, 59 St. Rep. 671, 29 Supp. 291. It is no defence to a proceeding for the non-payment of rent that the full amount thereof is not due, nor can a tenant plead a counterclaim in answer to the proceedings. *Barnum v. Fitzpatrick*, 42 St. Rep. 179, 16 Supp. 934.

A tenant can only make a general or a specific denial of the petition. *Durant v. East River El. L. Co.*, 25 St. Rep. 928, 15 Daly 337, 17 Civ. Pro. 224, 6 Supp. 659. Damages to a tenant's stock in trade caused by the landlord's failure to properly repair the premises in conformity with the provisions of the lease cannot be made the subject of counterclaim in an action for non-payment of rent. *Pearson v. Germond*, 83 Hun, 88, 63 St. Rep. 842, 31 Supp. 358. A person residing on the premises on whom the precept is served, or any person in possession, may serve a verified answer, although she is the tenant's wife, left in possession during his absence. *Matter of Wright*, 16 Supp. 808, 42 St. Rep. 455. In summary proceedings an answer denying any rent due, or that demand therefor had been made, verified by the defendant in the following words: "J. F., sworn, says that he is the defendant herein and that he knows the foregoing answer to be true," *held*, insufficient, there being nothing to indicate that the party intended to swear that the answer was true to his own knowledge. *Cherry v. Foley*, 42 St. Rep. 188, 16 Supp. 853. The only answer that can be made is a general denial, or a denial

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of a specific allegation in the petition, and if any portion of rent is due the landlord is entitled to a final order in his favor. *Barnum v. Fitzpatrick*, 42 St. Rep. 179, 16 Supp. 934, 27 Abb. N. C. 334. An eviction is a defence to summary proceedings for non-payment of rent. *Wetter v. Soubrious*, 22 Misc. 739, 49 Supp. 1043, 83 St. Rep. 1043. The provisions of the Code as to ouster of jurisdiction by plea of title in a justice's court do not apply to summary proceedings. *Wetter v. Soubrious*, 22 Misc. 739, 49 Supp. 1043, 83 St. Rep. 1043. An answer in summary proceedings which denies all the allegations of the petition except possession, raises an issue as to the relation of landlord and tenant and the indebtedness of rent; and the petitioner is not relieved from the burden of proving them by a subsequent separate defence which admits that he is the owner, but claims the lessor to whom the rent is paid is a third person who is not a party to the proceeding. *Fox v. Held*, 24 Misc. 184, 52 Supp. 724, 86 St. Rep. 724. While a tenant may ordinarily show that the title of the landlord has been defeated by some event happening after the making of the lease, he is estopped from so doing by a judgment recovered by the landlord since that event in summary proceedings in which the same facts were set forth as a defence, but upon a somewhat different theory, as such former adjudication conclusively established the continuance of the relation of landlord and tenant after such event. *Mulligan v. Cox*, 23 Misc. 695, 52 Supp. 111, 86 St. Rep. 111.

ARTICLE VIII.

TRIAL AND MISCELLANEOUS PROVISIONS. §§ 2246, 2247, 2248.

§ 2246. In N. Y. District Court, cause may be transferred to another court for trial.

In a District Court of the city of New York, at the time of joining issue, the justice sitting in the cause may, in his discretion, upon motion of either party, or, if no justice is present, the clerk may, by consent of both parties, make an order transferring the cause for trial, to a District Court of an adjoining district, which thereupon has the same jurisdiction and power at its own court-house, as if the property was situate within its district.

L. 1877, ch. 187, § 2, am'd.

§ 2247. [Am'd 1881 and 1882.] Trial.

The issues joined by the petition and answer must be tried by the judge or justice, unless either party to such proceedings shall, at the time designated in such precept for showing cause, demand a jury and at the time of such demand pay to such judge

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or justice the necessary costs and expenses of obtaining such jury. If a jury be demanded and such costs and expenses be paid, the judge or justice with whom such petition shall be filed shall nominate twelve reputable persons qualified to serve as jurors in courts of record, and shall issue his precept directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated to appear before such judge or justice at such time or place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such judge or justice well and truly to hear, try, and determine the matters in difference between the parties. After hearing the allegations and proofs of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the judge or justice for that purpose, who shall be sworn to keep such jury as is usual in like cases of courts of record. If such jury cannot agree after being kept together for such time as such judge or justice shall deem reasonable, he may discharge them and nominate a new jury, and issue a new precept in manner aforesaid.

R. S. § 34.

§ 2248. Adjournment.

At the time when issue is joined, the judge or justice may, in his discretion, at the request of either party, and upon proof to his satisfaction, by affidavit or orally, that an adjournment is necessary to enable the applicant to procure his necessary witnesses, or by consent of all the parties who appear, adjourn the trial of the issue, but not more than ten days; except by consent of all parties.

R. S. § 41.

Where an answer denied indebtedness for rent, alleging payment in full, and asked that the proceedings be dismissed with costs, and an application for a jury trial was denied, and judgment was rendered for the petitioner; *held*, error. *Bloom v. Huyck*, 71 Hun, 252, 54 St. Rep. 477, 25 Supp. 7. The dismissal of a precept of a District Court on the grounds that by reason of the purchase of a mortgage on the premises, the tenant became mortgagee in possession and not liable for rent, is error. *Constant v. Barrett*, 13 Misc. 249, 34 Supp. 163, 68 St. Rep. 210. As to what is sufficient to justify a dismissal of the precept where the petitioner proves facts alleged showing "constructive possession" as used in § 2245 of the Code, see *Lowman v. Sprague*, 73 Hun, 408, 26 Supp. 568, 58 St. Rep. 87. As to what cures error in drawing jury in the first instance, see *Bloomington v. Adler*, 7 Misc. 182, 27 Supp. 321, 57 St. Rep. 524. Clerk of the District Court has power on the return of the precept, when no justice is present, to adjourn the matter to a subsequent date on which the justice may receive the answer and proceed to trial. *Deutermann v. Nilson*, 15 Civ. Pro. 411, 20 St. Rep. 101, 3 Supp. 113. In a case where, by demand of one of the parties, a trial is had before a jury, the

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justice has no power to direct the verdict. *Horn v. Prior*, 22 St. Rep. 237; *George v. Trevellyn*, 12 Misc. 153, 33 Supp. 16, 66 St. Rep. 516.

In *Beadle v. Monroe*, 68 Hun, 323, 52 St. Rep. 182, 22 Supp. 981, it was held error to permit tenant to testify that he did not owe the rent claimed, that such evidence was incompetent and improper. In proceedings brought on the ground that the premises were being used as a bawdy-house, evidence as to their use in the past by the same tenant was held admissible. *Golet v. Lawlor*, 16 Misc. 59, 37 Supp. 691, 73 St. Rep. 132. Where the landlord proves the lease the burden of proving payment is on the tenant. *Collender v. Smith*, 20 Misc. 612, 45 Supp. 1130, 26 Civ. Pro. 318, 79 St. Rep. 1130. On the issue as to whether the holding was by the year or by the month, evidence as to the terms of other tenants is not admissible. *Schneider v. Hill*, 19 Misc. 56, 42 Supp. 879, 76 St. Rep. 879. On the issue as to the duration of a term of letting, proof of a conversation between landlord's agent and others, in the absence of defendant, to the effect that his authority was limited to the renting by the month of the premises is not admissible. *Babin v. Ensley*, 14 App. Div. 548, 77 St. Rep. 849, 43 Supp. 849. On the issue as to whether the letting was for a month or for an indefinite term, evidence that the landlord required the tenant to make repairs directed by the board of health, and to pay water rates, is incompetent. *Cohen v. Green*, 21 Misc. 334, 47 Supp. 136. Upon the extent of the relation of landlord and tenant, evidence tending to show that the deed given by the defendant to the plaintiff was in fact a mortgage, and that certain payments were made on the indebtedness, is admissible. *Queen City Bank v. Hood*, 15 Misc. 237, 36 Supp. 981, 72 St. Rep. 426. Where a tenant denies allegations in the petition that the rent is due, he may prove payment of the rent. It is not defence that all of the rent is not due, or that the landlord has demanded too much. *Durant Land Imp. Co. v. East River Elec. Light Co.*, 15 Daly 337, 25 St. Rep. 928, 6 Supp. 659, 17 Civ. Pro. 224. In proceedings against a tenant claiming to hold over, a receipt for rent given by a person from the landlord subsequent to notice to quit is not admissible, unless it is shown that the landlord authorized receiving it. *Schneider v. Hill*, 19 Misc. 56, 42 Supp. 879, 76 St. Rep. 879. Payment of rent due by a tenant during a stay granted to enable

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him to do so operates as a discontinuance of summary proceedings. The issuance of a warrant of dispossession thereafter is not authorized and does not terminate the lease. *Newcombe v. Eagleton*, 19 Misc. 603, 44 Supp. 401, 78 St. Rep. 401. Where the petition and precept conform to the statute and proper service has been made on the tenant, who fails to answer, the District Court has no authority to refuse judgment and a warrant of dispossession, and no authority to continue the proceedings at a future date on his own motion. *People ex rel. Allen v. Murray*, 2 Misc. 152, 23 Civ. Pro. 71, 21 Supp. 797. Summary proceedings are not "actions" within §§ 2951-52 of the Code, and a justice is not ousted of jurisdiction by the filing of the answer setting up claim of title to land and tender of an undertaking. *People ex rel. Baldwin v. Goldfogle*, 62 St. Rep. 70, 23 Civ. Pro. 417.

In a proceeding to remove a person from a portion of a pier described in the complaint by metes and bounds, if the agreement proved at the trial does not amount to a lease of the premises described, the variance is fatal. *People v. Cushman*, 1 Hun, 73. Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord and payment to him of rent by the tenant, establishes both these issues against the tenant. *People v. Teed*, 48 Barb. 424. Where plaintiff has given evidence tending to show defendant went into possession with his permission and under an agreement to vacate when requested, defendant denying such agreement and claiming that she entered in right of her children, and that plaintiff had given her the premises in consideration of services, the defendant should be allowed to introduce evidence to sustain such defence. *People v. Lockwood*, 3 Hun, 304. The lessee may show that the instruments which purport to create the relation of landlord and tenant between the parties constitute in fact a mortgage to secure the repayment of a loan, and that such mortgage was void for usury. It will be presumed the offer will be proved by competent evidence. *People v. Howlett*, 13 Hun, 138, 76 N. Y. 574. Proof, to the effect that the instrument relied on to show the tenancy as a basis for a summary proceeding, is void for fraud in its procurement, and is not admissible or competent matter of defence. *Becker v. Church*, 42 Hun, 258, citing *People v. Howlett*, 76 N. Y. 574. The taking

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of a chattel mortgage to secure the payment of overdue rent at a future day, and also to secure subsequently accruing rent, is not a bar to summary proceedings in case of non-payment of such subsequent instalments of rent. Proof of service of notice to quit, when denied by answer, should not be made by affidavit, but by competent proof. *People v. Walsh*, 13 Weekly Dig. 440.

Justices of the District Courts have no power under the Consolidation Act to open defaults in summary proceedings. *Cochrane v. Reich*, 20 Misc. 593, 46 Supp. 441. A final order in summary proceedings entered by default will not be vacated on affidavits merely stating that the defendant's attorney reached court one-half hour late, and that the defendant is not indebted to the landlord, where it does not appear that any injustice has been done, under § 3064 of the Code. *Mullane v. Roberge*, 21 Misc. 342, 47 Supp. 155. Where default is made upon return of the precept the landlord is entitled to his writ without further order. *Peer v. O'Leary*, 8 Misc. 350, 59 St. Rep. 424, 28 Supp. 687.

An adjournment, except at the request of a party to procure his witnesses, it is said, operates as a discontinuance; so held under language of Revised Statutes, in *Boller v. Mayor*, 40 N. Y. Super. 523. But *contra*, *Brown v. Mayor*, 66 N. Y. 385. The justice loses jurisdiction by an indefinite adjournment, and the execution of his warrant may be stayed by injunction. *Kiernan v. Reming*, 2 How. (N. S.) 89. It seems there is no provision of the statute authorizing an adjournment after the trial, and an indefinite adjournment or postponement for deliberation and decision ousts the justice of jurisdiction. *Gillilan v. Spratt*, 41 How. 27. But see *People v. Kelly*, 20 Hun, 549, which holds that the justice does not lose jurisdiction where adjournment is by consent, and that the mere taking of time after the trial to consider the questions raised is not in the nature of an adjournment. The justice is entitled to four days in which to render his decision. *People v. Loomis*, 27 Hun, 328. Where the under-tenant only appeared on the return day, and the matter was then adjourned by consent, and on the adjourned day judgment was rendered for the landlord, it was held that there was no error. *People v. Mayor*, 66 N. Y. 385. In summary proceedings before a court of limited jurisdiction, evidence is not admissible on behalf of the petitioner to show that a conveyance by him, absolute on its face, was not

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delivered as an absolute conveyance, but that he verbally reserved the use and benefit of the premises for life. *Matter of Hattersley v. Cronyn*, 22 Misc. 259; *sub nom. Hattersley v. Cronyn*, 49 Supp. 1113, 83 St. Rep. 1113.

ARTICLE IX.

FINAL ORDER AND ITS EFFECT. §§ 2249, 2250, 2264.

§ 2249. Final order upon trial.

If sufficient cause is not shown upon the return of the precept; or if the verdict of the jury, or the decision of the judge or justice, upon a trial without a jury, is in favor of the petitioner, the judge or justice must make a final order, awarding to the petitioner the delivery of the possession of the property, except that, where the case is within § 2237 of this act, the final order must direct the removal of the occupant. In either case, the final order must award to the petitioner the costs of the special proceeding. If the verdict or decision is in favor of the person answering, the judge or justice must make a final order accordingly, and awarding to him the costs of the special proceeding.

See L. 1849, ch. 193 (2 Edm. 533).

§ 2250. [Am'd, 1882.] Amount of costs; how collected.

Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter twenty-one of this act, must be at the rate allowed by law in an action in a justice's court [], and are limited in like manner, unless the application is founded upon an allegation of forcible entry or forcible holding out, in which case the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars, in addition to his disbursements. If the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a justice of the peace. In every other case [] an execution may be issued to collect the costs awarded thereby [] as if the final order was a judgment rendered in the court of which the judge or justice is the presiding officer.

§ 2264. Application of this title; effect of final order.

This title does not impair the rights of a landlord, lessor, or tenant in a case not therein provided for. Where a special statutory provision confers a right to take proceedings in the manner heretofore prescribed by law for the summary removal of a person in possession of real property, the proceedings thereunder must be taken as prescribed in this title. A final order, made in a special proceeding taken as prescribed in this title, is not a bar to an action of ejectment to recover the property affected thereby.

Judgment by default is, as between the parties, conclusive as to facts alleged as the basis of the proceedings, but is not conclusive as to the amount of rent nor facts not in issue. *Dickinson v. Price*, 64 Hun, 149, 45 St. Rep. 159, 18 Supp. 801. Judgment of a court of competent jurisdiction in summary proceed-

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ings in favor of the petitioner is an adjudication that the relation of landlord and tenant existed between the parties, and is a bar to an action to avoid the lease. *Reich v. Cochran*, 74 Hun, 551, 20 Misc. 623, 46 Supp. 443, affirmed, 151 N. Y. 122. Equitable rights of a tenant cannot be enforced in such proceeding. *Earle v. McGoldrick*, 36 Supp. 803, 15 Misc. 135, 71 St. Rep. 825. Judgment dispossessing an assignee of a lease without objection on the return of the precept is conclusive in an action subsequently brought by the landlord against defendant for rent, and will preclude defendant from showing that at the time of said judgment there was any privity of estate between himself and the plaintiff because he had then assigned the lease and vacated the premises. *Grafton v. Brigham*, 70 Hun, 131, 54 St. Rep. 103, 24 Supp. 54. An allegation of possession in a verified petition is sufficient to support judgment for the landlord, where the tenant refuses to proceed and withdraws from the proceedings, and it is admitted that his property is still on the premises. *Burrell v. Do Sin*, 10 Misc. 745, 31 Supp. 804, 24 Civ. Pro. 243. Where a lease provides for the payment of water rates, and that if not paid the landlord may enforce payment of rent reserved, he is entitled to a final order if rents or water rates remain unpaid. *Cochran v. Reich*, 20 Misc. 623, 46 Supp. 443. It is the duty of the justice of a district court to which summary proceedings have been transferred for trial to make final order. *Wyckoff v. Frommer*, 12 Misc. 149, 33 Supp. 11, 66 St. Rep. 511. A final order dispossessing tenants is not binding as to the rent for a period included within the term of an undertaking given to stay, pending appeal, the execution of a warrant for delivery of the possession of the premises as against sureties named therein. *Rosenquest v. Noble*, 21 App. Div. 583. Judgment in favor of landlord for non-payment of rent bars an action by the tenant to cancel the lease. *Reich v. Cochran*, 151 N. Y. 122, affirming 74 Hun, 551, 26 Supp. 443. In case a tenant moves out in compliance with the precept before return day, or after final order, in both cases the lease is terminated without the issuance of a warrant. *Ash v. Purnell*, 26 Abb. N. C. 92, 19 Civ. Pro. 234, 16 Daly, 189, 32 St. Rep. 606, 11 Supp. 514. A judgment in summary proceedings was set aside where the landlord, to obtain it, promised to credit the rent of sub-tenants on the lease. *Elverston v. Vanderpoel*, 69 N. Y. 610. The order is to be made as re-

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quired by statute. *Starkweather v. Seecley*, 45 Barb. 164. It was held, in *New York Mutual Life Insurance Company v. Waldron*, in Common Pleas, reported in *New York Daily Reg.*, January 6, 1881, and 11 Week. Dig. 245, and 9 Daly, 472, that no costs can be allowed beyond the marshal's fees where proceeding is in District Court. The section has since been amended. As to costs in New York City, see Laws of 1882, chap. 410 (Consolidation Act), § 1418.

Precedent for Final Order.

Before William S. Kenyon, *County Judge*.

James Dubois

agst.

Samuel Kline.

Precept to show cause returnable the 24th day of June, 1886, at two o'clock, afternoon.

The petitioner appears on the 24th day of June and demands the possession of the premises within mentioned for (recite the cause).

The tenant appears (recite the facts).

Final order is, therefore, made the 28th day of June, 1886, in favor of the said petitioner, and I hereby award to the petitioner the delivery of the possession of the premises within described by reason of (recite the cause), and I hereby order that a warrant issue to remove the said tenant and all persons from said premises, and to put the petitioner into full possession thereof, and I award to the petitioner costs of the said proceedings.

WILLIAM S. KENYON,

County Judge of Ulster County.

It seems that a judgment by default for non-payment of rent is conclusive in the landlord's action to recover rent as to the existence and validity of the lease, the occupation by the tenant, and that some rent is due, but it is not conclusive as to the amount of rent, though it is alleged in the affidavit on which the proceedings are founded. *Jarvis v. Driggs*, 69 N. Y. 143; *Broton v. Mayor*, 66 id. 385. In proceedings to recover rent, judgment in summary proceedings and papers used as evidence therein are not evidence of the lease, or of the length of occupancy or its terms. *Evans v. Post*, 5 Hun, 338. Judgment in summary proceeding is conclusive of the liability of tenant for rent in a subsequent action brought to collect it. *Grafton v.*

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Brigham, 70 Hun, 131, 24 Supp. 54. A judgment that the tenancy was from year to year, and that the tenants were not holding over after the expiration of the term, does not bar another suit brought for the same purpose after the expiration of the year. *Matthews v. Matthews*, 49 Hun, 346, 2 Supp. 121.

ARTICLE X.

WARRANT AND HOW PROCEEDINGS STAYED. §§ 2251, 2252, 2253, 2254, 2255, 2265.

§ 2251. [Am'd, 1882.] Warrant to dispossess defendant.

Where the final order is in favor of the petitioner, the judge or justice must thereupon issue a warrant, under his hand, directed to the sheriff of the county, or to any constable or marshal of the city or town, in which the property, or a portion thereof, is situated, or if it is not situated in a city, to any constable of any town in the county, describing the property, and commanding the officer to remove all persons therefrom, and also, except where the case is within § 2237 of this act, to put the petitioner into the full possession thereof.

See L. 1857, ch. 684; also §§ 58, 59, 63, 64, and L. 1868, ch. 764 (7 Edm. 335).

§ 2252. Execution of warrant.

The officer, to whom the warrant is directed and delivered, must execute it, according to the command thereof, between the hours of sunrise and sunset.

R. S. § 40.

§ 2253. When warrant cancels lease; exception.

The issuing of a warrant for the removal of a tenant from demised premises, cancels the agreement for the use of the premises, if any, under which the person removed held them; and annuls accordingly the relation of landlord and tenant, except that it does not prevent a landlord from recovering, by action, any sum of money, which was, at the time when the precept was issued, payable by the terms of the agreement, as rent for the premises; or the reasonable value of the use and occupation thereof, to the time when the warrant was issued, for any period of time, with respect to which the agreement does not make any special provision for payment of rent.

Id. § 43; also, § 60; L. 1868, ch. 764 (7 Edm. 336).

§ 2254. [Am'd. 1885.] Warrant; when and how stayed.

The party, against whom a final order is made, requiring the delivery of possession to the petitioner, may, at any time before a warrant is issued, stay the issuing thereof; and also stay an execution to collect the costs, as follows:

1. Where the final order establishes that a lessee or tenant holds over, after a default in the payment of rent, or of taxes, or assessments, he may effect a stay, by payment of the rent due, or of such taxes or assessments, and interest and penalty, if any thereon due, and the costs of the special proceeding; or by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs, within ten days, at the expiration of which time a warrant may issue, unless he produces to the judge or justice satisfactory evidence of the payment.

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2. Where the final order establishes that a lessee or tenant has taken the benefit of an insolvent act, or has been adjudicated a bankrupt, he may effect a stay by paying the costs of the special proceeding, and by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay the rent of the premises, as it has become, or thereafter becomes due.

3. Where the final order establishes that the person against whom it is made, continues in possession of real property, which has been sold by virtue of an execution against his property, he may effect a stay, by paying the costs of the special proceeding and delivering to the judge or justice, or the clerk of the court, an affidavit, that he claims the possession of the property, by virtue of a right or title, acquired after the sale, or as guardian or trustee for another; together with his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay any costs and damages, which may be recovered against him, in an action of ejectment to recover the property, brought against him by the petitioner within six months thereafter; and that he will not commit any waste upon or injury to the property, during his occupation thereof.

R. S. § 44, am'd by L. 1857, ch. 684, and §§ 45 and 46.

§ 2255. Undertaking; how disposed of.

Where an undertaking is given, in a case specified in subdivision first of the last section, the judge or justice must deliver it to the person against whom the final order was made, upon his producing the evidence of payment, mentioned in that subdivision. If he does not produce such evidence within ten days, the judge or justice must deliver it to the petitioner. In every other case specified in the last section, the judge or justice must deliver the undertaking to the petitioner, immediately after his approval thereof.

§ 2265. How proceedings under this title to be stayed.

Where a petition is presented, as prescribed in this title, the proceedings thereupon before the final order, and if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon, cannot be stayed or suspended by any court or judge, except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal, in a case and in the manner specially prescribed for that purpose in this title.

2. By an injunction order, granted in an action against the petitioner. Such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings, in an action of ejectment, brought by the petitioner, and upon the like terms; or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action, and upon the like terms.

R. S. § 47.

In case the magistrate refuse to issue the warrant on demand after decision, mandamus lies. *People v. Willis*, 5 Abb. 205.

Precedent for Warrant.

To the Sheriff of Ulster County:

WHEREAS, Cornelius Van Cott, by petition made and verified by him and presented to me, county judge of Ulster County, did allege and prove that (here recite facts stated in petition). Whereupon I

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issued a precept, requiring the said Lamont Jones forthwith to remove from the said premises, or show cause before me at a certain time, now passed, why the possession of the said premises should not be delivered to the said petitioner. And no good cause having been shown, or any way appearing to the contrary, and due proof of the service of such precept having been made to me : Therefore in the name of the people of the State of New York, you are commanded to remove the said Lamont Jones, and all persons, from the said premises, and put the petitioner in full possession thereof.

In witness whereof, I have subscribed to these presents, the 28th day of June, 1886.

WILLIAM S. KENYON,
County Judge of Ulster County.

Where a warrant complies with § 2251 of the Code, the fact that it recites the name of the husband of the tenant against whom the proceedings are taken does not make it defective. *Babin v. Ensley*, 14 App. Div. 548, 43 Supp. 849. Where a tenant surrenders the premises under a final order in summary proceedings, the issuance of a warrant is unnecessary. *Gallagher v. Reilly*, 16 Daly, 227, 31 St. Rep. 556, 10 Supp. 536. It is no part of the duty of a justice to deliver the warrant to the officer for execution. The warrant is issued when it is signed and delivered to the clerk of the court. *Ash v. Purnell*, 26 Abb. N. C. 92, 19 Civ. Pro. 234, 16 Daly 189, 32 St. Rep. 606, 11 Supp. 514.

The provisions of § 2253 authorize a landlord to recover in the same action for rent due and accruing according to the terms of the lease and for the use by the tenant up to the time of issuing the warrant. *Fursman v. Pennace*, 15 Civ. Pro. 340, 2 Supp. 339. An eviction does not discharge from payment of rent already accrued, it only annuls the lease as to future rights and liabilities. *Johnson v. Oppenheim*, 55 N. Y. 280. The effect of the judgment in summary proceedings, and its execution, is that the lessee is divested of all right to, and control over, the property, and the owners are in possession as of their former estate, as owners of the reversion. *Pursell v. New York Life Insurance Company*, 42 N. Y. Super. 383. Though the tenant has been removed from the demised premises for non-payment of rent, yet the landlord can recover the rent due by action up to the time of issuing the warrant to dispossess. *Hinsdale v. White*, 6 Hill, 507; *McKoon v. Whiting*, 3 Denio, 452; *Giles v. Comstock*, 4 N. Y. 270; *Academy of Music v. Hackett*, 2 Hilt. 217; *Whitney v. Meyers*, 1 Duer, 266; *Stuyvesant v. Ginnler*, 12 Abb. (N. S.) 6; *Johnson v. Oppenheim*,

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55 N. Y. 280. Where the eviction was during a quarter for which rent was payable in advance, it was held the most the tenant could equitably claim was a deduction for the unexpired part of the quarter. *Healy v. McManus*, 23 How. 238; *Giles v. Comstock*, 4 N. Y. 270. It is said in some of the cases above cited, and in *Featherstonhaugh v. Bradshaw*, 1 Wend. 134; *Davidson v. Donadi*, 2 E. D. S. 121; *Hackett v. Richards*, 3 id. 13; *Crane v. Hardman*, 4 id. 339, that the remedy after default is not on the lease, but against the tenant as a wrong-doer. The section, as it now stands, provides for these contingencies :

In the absence of special direction by the landlord, he cannot be held liable for any abuse of process by the officer. *Welch v. Cochran*, 63 N. Y. 181. But where the landlord directs the removal of the property of the tenant, or that of others, in the landlord's possession, he should be held liable for the negligence or carelessness, if any, of the constable removing them, but the question of due care and prudence is peculiarly one of fact for the referee. *Jansen v. Bernard*, 12 Week. Dig. 499. Where the rent is payable monthly in advance under a lease for a year, the landlord is entitled to a whole month's rent, notwithstanding the tenant is dispossessed by virtue of a warrant in summary proceedings before the expiration of the month for default in payment. *Bernstein v. Heineman*, 23 Misc. 466. An action may be maintained to perpetually restrain summary proceedings pending before a county judge instituted by defendant in that action to remove the plaintiff therein from certain premises upon averment and proof that the defendant was not the owner of the premises, and that the plaintiff was induced to sign the lease by fraud on the part of the defendant, and this without regard to the question as to the jurisdiction of the county judge to try the question of fraud in the summary proceedings. *Becker v. Church*, 115 N. Y. 562, 26 St. Rep. 775, affirming 42 Hun, 258, 5 St. Rep. 97. A stay of proceedings pending appeal must be obtained in the method prescribed by statute, and an injunction will not be granted for the purpose. *Ludwig v. Lazarus*, 10 App. Div. 62, 41 Supp. 773. A court of equity has jurisdiction to perpetually restrain summary proceedings in a district court or in a justices' court where there are peculiar equities which such a court cannot decide. *Noble v. McGurk*, 16 Misc. 461, 39 Supp. 921. They may be restrained by injunction when void for want of jurisdiction. *Schneider v.*

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Leizmann, 57 Hun, 561, 33 St. Rep. 351, 19 Civ. Pro. 217, 11 Supp. 434. But the court will only restrain summary proceedings in extreme and clear cases. *Campbell v. Babcock*, 13 Supp. 843, 26 Abb. N. C. 35. Injunction cannot be granted on the ground that the petition did not describe the premises or did not state the petitioner's interest and was not duly verified, as these are matters within the jurisdiction of the justice to determine; or that a defence of another action pending was allowed. *Bliss v. Murray*, 17 Civ. Pro. 64, 7 Supp. 917. In an action by defendant to annul a lease on equitable grounds an injunction may be granted. *Rodgers v. Earle*, 5 Misc. 164, 23 Civ. Pro. 220. Section 2265 implies that an injunction may be granted before the final order in summary proceedings, at least where one could be granted to stay proceedings in an action of ejectment. *Gilman v. Prentice*, 3 St. Rep. 544, citing *Chadwick v. Spargur*, 1 Civ. Pro. 422. An injunction will not issue unless the magistrate or court has no jurisdiction. *Capet v. Parker*, 3 Sandf. 662; *Sherman v. Wright*, 49 N. Y. 227. In case there has been fraud, undue advantage, or surprise in the conduct of the proceedings. *Mary v. James*, 2 Daly, 437; *Griffith v. Brown*, 28 How. 4; *Cure v. Crawford*, 5 id. 293; *Forrester v. Wilson*, 1 Duer, 624; and in case the defence is of an equitable character, not cognizable before the justice of county court. *McIntyre v. Hernandez*, 39 How. 121; *Armstrong v. Cummings*, 20 Hun, 313. It is said by Landon, J., in dissenting opinion in *Becker v. Church*, 42 Hun, 264, citing *Knox v. McDonald*, 25 id. 268, and *Broadwell v. Holcomb*, 4 Civ. Pro. 159, that summary proceedings will not be restrained by injunction unless the tenant has some equity or defence of which the county judge has no jurisdiction. Same principle, *Gilman v. Prentice*, 3 State Rep. 544. This question is discussed in *Bokce v. Hammersly*, 16 How. 461. The decision in *Bean v. Pettengill*, 7 Robt. 7, is against the current of authority as to the right to an injunction in case of lack of jurisdiction. In addition to these grounds, it is held in *Landon v. Supervisors of Schenectady*, 24 Hun, 75, that the right of a tenant to remove a building may be sufficient ground for an injunction. Where a justice of a New York District Court refuses to appoint a guardian *ad litem* for an infant defendant, the latter cannot maintain an action to restrain the enforcement of the warrant; the remedy is by appeal. *Jessurun v. Mackie*, 24 Hun, 624, appeal dismissed,

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86 N. Y. 622. An injunction will not be granted after the warrant of dispossession has been executed. *Roberts v. Matthews*, 18 Abb. 199. Nor where the defendant has a perfect defence to the proceeding, and does not show that he had no evidence to prove such defence. *Seebach v. McDonald*, 11 Abb. 95. Nor in any case where the defence could have been proven on the hearing. *Rapp v. Williams*, 4 T. & C. 174; *Wordsworth v. Lyton*, 5 How. 463; *Smith v. Burr*, 8 id. 168; *Marks v. Wilson*, 11 Abb. 87; *Ward v. Kelsey*, 14 id. 106; *McGune v. Palmer*, 5 Robt. 607. An injunction will not issue, because there exists a counterclaim against the rent, if the landlord is solvent. *Brown v. Metropolitan Gas-Light Co.*, 38 How. 133. As to whether it will issue where it is claimed lease has been extended, see *Rapp v. Williams*, 1 Hun, 716; *Crawford v. Kastner*, 26 id. 440. An injunction will not be granted to one not a party to the proceeding merely because he is likely to be disturbed in his possession, the threatened injury not being irreparable. *Aaron v. Baum*, 7 Robt. 340; *Many v. James*, 37 How. 52. Where an action is pending for a renewal of the lease, if the tenant shows himself equitably entitled to a renewal, an injunction will issue. *Graham v. James*, 7 Robt. 468; *Crawford v. Kastner*, 26 Hun, 408. An injunction can issue after the warrant is issued. *Griffith v. Brown*, 28 How. 4; *Forrester v. Wilson*, 1 Duer, 624. In *Carsels v. Fisk*, 15 Week. Dig. 255, it is said that nothing short of an extreme case, clearly established, will justify an injunction to stay summary proceedings against a tenant. In *Knox v. McDonald*, 25 Hun, 268, it is held that an injunction should not issue to restrain the execution of the warrant, unless the plaintiff is making an oppressive use of it, or that the plaintiff's title to the premises has terminated, or that the defendant has acquired some interest or equity in the subject-matter of the action which should be protected, or that the judgment was obtained by fraud or collusion. An injunction cannot be granted until there has been a final order in the summary proceedings. *Matter of White*, 12 Abb. N. C. 348.

An injunction will not be granted to prevent the landlord from instituting proceedings on the ground that he has extended the lease. That question is to be determined in the summary proceedings. *Rapp v. Williams*, 1 Hun, 716. Before the final order in summary proceedings, an injunction can be granted against the petitioner, only in a case where it would be granted

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to stay proceedings in an action of ejectment. *People v. Parker*, 63 How. 3. After the entry of a final order awarding possession to the landlord by reason of the illegal use of the premises, the court has no authority to stay execution of warrant. *Shaw v. McCarty*, 2 McCarty, 235; *Van Schaick v. Coster*, id. 239. The justice loses jurisdiction by an indefinite adjournment, and the execution of his warrant thereafter should be restrained by injunction. *Kiernan v. Reming*, 2 How. (N. S.) 89; *Brown v. Cassady*, 34 Hun, 55. When the defence is an equitable one, if the District Court proceed with the case it may be enjoined. *Crawford v. Kastner*, 26 Hun, 440. There is no provision for stay on an appeal from a judgment in case of tenant holding over after expiration of his term, or in case of forcible entry or detainer, except where there are allegations of fraud or collusion in the proceedings, or that the magistrate has no jurisdiction. *Coster v. Van Schaick*, 64 How. 100.

In an action on an undertaking, given in consideration of plaintiff discontinuing proceedings to dispossess defendant, and to deliver up said premises at a specified time, which defendant failed to do, the reasonable costs and expenses incurred by plaintiff in obtaining said possession are a portion of the damage which he is entitled to recover. *Schermerhorn v. Carter*, 8 Week. Dig. 383. This section was held applicable to chapter 384, Laws of 1854, relating to tax sales in the city of Brooklyn, and proceedings thereunder were stayed by undertaking in *People v. Palmer*, 16 Hun, 136.

Precedent for Undertaking where Property has been Sold.

(Title.)

WHEREAS, In certain proceedings, commenced on the 14th day of July, 1886, before William S. Kenyon, Esq., county judge of Ulster County, by Lamont Johnson against Daniel Hinkley, to recover the possession of certain real estate, to wit: (here insert description of property) sold on execution against said Daniel Hinkley, the said judge has, by final order made the 12th day of August, 1886, established that the said Daniel Hinkley continues in possession of said real property, after such execution sale, and the said Daniel Hinkley, having paid the costs of said special proceedings, and filed the affidavit required by subdivision 3 of § 2254 of the Code of Civil Procedure: Now, therefore, in order to stay the issuing of the warrant in said proceedings, and in order to satisfy the requirements of said statute, we, the said Daniel Hinkley, before named, and James Dyer, of Kingston, and Hiram

ART. II. Redemption.

Sidney, of Saugerties, said county, do hereby undertake that the said Daniel Hinkley will pay to the said Lamont Johnson any costs and damages which may be recovered against him, the said Daniel Hinkley, in an action of ejectment to recover the property to be brought against him, by the said Lamont Johnson, within six months thereafter, and that he, the said Daniel Hinkley, will not commit waste upon, or injury to, the property during his occupation.

Dated Kingston, August 20, 1887.

(Add acknowledgment and justification, usual forms.)

ARTICLE XI.

REDEMPTION. §§ 2256, 2257, 2258, 2259.

§ 2256. Redemption by lessee.

Where the special proceeding is founded upon an allegation that a lessee holds over, after a default in the payment of rent, and the unexpired term of the lease, under which the premises are held, exceeds five years, at the time when the warrant is issued; the lessee, his executor, administrator, or assignee, may, at any time within one year after the execution of the warrant, pay or tender to the petitioner, his heir, executor, administrator, or assignee, or if, within five days before the expiration of the year, he cannot, with reasonable diligence, be found within the city or town, wherein the property, or a portion thereof, is situated, then to the judge or justice who issued the warrant, or his successor in office, all rent in arrear at the time of the payment or tender, with interest thereupon, and the costs and charges incurred by the petitioner. Thereupon the person making the payment or tender shall be entitled to the possession of the demised premises, under the lease, and may hold and enjoy the same, according to the terms of the original demise, except as otherwise prescribed in the next section but one.

L. 1842, ch. 240, § 1 (4 Edm. 661), am'd.

§ 2257. Id.; by creditor of lessee.

In a case specified in the last section, a judgment creditor of the lessee, whose judgment was docketed in the county, before the precept was issued, or a mortgagee of the lease, whose mortgage was duly recorded, in the county, before the precept was issued, may, at any time before the expiration of one year after the execution of the warrant, unless a redemption has been made as prescribed in the last section, file with the judge or justice who issued the warrant, or with his successor in office, a notice, specifying his interest and the sum due to him; describing the premises; and stating that it is his intention to redeem as prescribed in this section. If a redemption is not made by the lessee, his executor, administrator, or assignee, within a year after the execution of the warrant, the person so filing a notice, or, if two or more persons have filed such notices, the one who holds the first lien, may, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding the last day of the year, redeem for his own benefit, in like manner as the lessee, his executor, administrator, or assignee might have so redeemed. Where two or more judgment creditors or mortgagees have filed such notices, the holder of the second lien may so redeem, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which the holder of the first lien might have redeemed; and the holder of the third and each subsequent lien, may redeem, in like manner, at any

Art. II. Redemption.

time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which his predecessor might have redeemed. But a second or subsequent redemption is not valid, unless the person redeeming pays or tenders to each of his predecessors who has redeemed, the sum paid by him to redeem, and also the sum due upon his judgment or mortgage; or deposits those sums with the judge or justice, for the benefit of his predecessor or predecessors.

L. 1842, ch. 240, § 1 (4 Edm. 461).

§ 2258. The last two sections qualified.

Where a redemption is made, as prescribed in either of the last two sections, the rights of the person redeeming are subject to a lease, if any, executed by the petitioner, since the warrant was issued, so far that the new lessee, his assigns, under-tenants, or other representatives, may, upon complying with the terms of the lease, hold the premises so leased until twelve o'clock, noon, of the first day of May, next succeeding the redemption. And, in all other respects, the person so redeeming, his assigns and representatives, succeed to all the rights and liabilities of the petitioner, under such a lease.

§ 2259. Order to be made thereupon; liability of person redeeming.

The person redeeming, as prescribed in the last three sections, or the owner of the property so redeemed, may present to the judge or justice who issued the warrant, or to his successor in office, a petition, duly verified, setting forth the facts of the redemption, and praying for an order, establishing the rights and liabilities of the parties upon the redemption. Whereupon the judge or justice must make an order requiring the other party to the redemption to show cause before him, at a time and place therein specified, why the prayer of the petition should not be granted. The order to show cause must be made returnable, not less than two nor more than ten days, after it is granted; and it must be served at least two days before it is returnable. Upon the return thereof, the judge or justice must hear the allegations and proofs of the parties, and must make such a final order as justice requires. The costs and expenses must be paid by the petitioner. The final order, or a certified copy thereof, may be recorded in like manner as a deed. A person, other than the lessee who redeems as prescribed in the last three sections, succeeds to all the duties and liabilities of the lessee, accruing after the redemption, as if he was named as lessee in the lease.

A tenant dispossessed under summary proceedings cannot redeem within the year, unless on payment of all rent in arrears and all costs and charges incurred by the lessor, he is not entitled to an account of the intermediate rents and profits. *Pursell v. N. Y. Life Insurance Co.*, 10 J. & S. 383. And it is held in the same case that tender of the difference between said arrears and the profits received by the landlord during the interval is not sufficient. The landlord can only be called upon to account after a redemption under the statute has been effected, but if he has accepted payment of a less sum an accounting may be had to ascertain whether there has been a waiver. *Crawford v. Waters*, 46 How. 210. The provisions of 2 Revised Statutes, 515, § 43, were not repealed as to leases having an unexpired term of five

Art. 11. Redemption.

years to run, by chap. 240, Laws of 1842. *Pursell v. N. Y. Life Insurance Co.*, 42 N. Y. Super. 383. To entitle the lessee to redemption it must appear that the unexpired term of the lease exceeds five years at the time of the issuing the warrant, and that the rent and costs have been properly tendered or security offered. *Bokce v. Hammersly*, 16 How. 461. The right of a tenant to redeem from purchaser at foreclosure is discussed in *People v. Dudley*, 58 N. Y. 323.

A tenant who has been removed for non-payment of taxes and assessments cannot recover possession by tender thereafter. *Witty v. Acton*, 58 Hun, 552, 35 St. Rep. 949, 12 Supp. 757, affirming 29 St. Rep. 653, 9 Supp. 247. Temporary receiver has power to maintain redemption proceedings and acts therein both for the corporation and its creditors, and the corporation is not an indispensable party. The Code includes under the term "rent" only rent proper, and not taxes and other expenditures imposed by the lease upon the tenant, and under the term "costs and charges" only the costs and charges in regaining possession. *Bien v. Bixby*, 18 Misc. 415, 41 Supp. 433, 75 St. Rep. 837. The adjustment of the rights of the parties in a proceeding by a tenant to redeem after being dispossessed is not limited to the covenants contained in the lease. *Bien v. Bixby*, 22 Misc. 126, 48 Supp. 810, 82 St. Rep. 810. In a proceeding by a tenant under a ground lease which has several years to run, to redeem after dispossession for non-payment of rent, the landlord is entitled to credit for repairs ordered by the building department and alterations and improvements essential to the successful management of the property, made after the dispossession took place, for insurance during the intervening time, and for expenses incurred for legal services in procuring the dispossession and in procuring proper custodians during the proceeding. *Bien v. Bixby*, 22 Misc. 126, 48 Supp. 810, 82 St. Rep. 810. While petitioner's tender to the landlord of the rent actually due, together with the costs and charges of the summary proceedings, is sufficient to form the basis of redemption proceedings under § 2256 of the Code, final judgment of the amount to be paid is not dependent upon the claim for rent but dependent upon general principles of equity. The rights of the parties founded upon circumstances arising during a period when the premises were in the landlord's custody, intermediate between the tenant's dispossession and his

Art. 12. Appeal and Restitution.

petition for repossession, are not to be measured by the lease. *Bien v. Bixby*, 22 Misc. 128, modifying and affirming S. C. 18 Misc. 415. Where the tenant is credited with rent received from an intermediate tenant, the landlord should be allowed the rental value of new furnishings supplied by him and which formed part of the consideration for such rent. *Bien v. Bixby*, 22 Misc. 126, 48 Supp. 810, 82 St. Rep. 810. In such a proceeding the landlord cannot be allowed commissions on the rents received by him and credited to the tenant. *Bien v. Bixby*, 22 Misc. 126, 48 Supp. 810, 82 St. Rep. 810. In such a proceeding the landlord cannot be charged with rent not actually received by him, unless his failure to collect the same was the result of negligence or mismanagement. *Bien v. Bixby*, 22 Misc. 126, 48 Supp. 810, 82 St. Rep. 810. A redemption takes effect as of the date of tender by the tenant. *Bien v. Bixby*, 22 Misc. 126, 48 Supp. 810, 82 St. Rep. 810.

ARTICLE XII.

APPEAL AND RESTITUTION. §§ 2260, 2261, 2262, 2263.

§ 2260. Appeal.

An appeal may be taken from a final order, made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in the court, of which the judge or justice is the presiding officer, and with like effect; except as otherwise prescribed in the next two sections.

Substituted for § 47, R. S., am'd; L. 1868, ch. 828 (7 Edm. 357), § 52; L. 1849, ch. 193 (2 Edm. 534).

§ 2261. [Am'd, 1895.] Effect of appeal limited in certain cases.

The issuing or execution of the warrant cannot be stayed by such an appeal, or by the giving of an undertaking thereupon, otherwise than as prescribed in the next section. An appeal cannot be taken to the Court of Appeals, from a final determination of the appellate division of the Supreme Court, upon such an appeal, unless the latter court, by an order, made at the term of the appellate division where the final order is made, or the next term thereafter, allows it to be taken.

L. 1895, ch. 946.

§ 2262. [Am'd, 1895.] Warrants; how stayed on appeal.

Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in payment of rent or from an order or judgment affirming such final order, the issuing and execution of the warrant may be stayed by the order of the county judge, and in the city and county of New York by a justice of the Supreme Court, upon the appellant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from and also an undertaking to the petitioner in a sum and with sureties approved by the county judge or in the city and county of New York by a justice of the Supreme Court to the effect that if, upon the appeal, a final deter-

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mination is rendered against the appellant he will pay all rents accruing or to accrue upon the premises, or if there is no lease thereof the value of the use and occupation of the premises subsequent to the institution of the special proceedings.

L. 1895, ch. 946.

§ 2263. **Appellate court may award restitution ; action for damages.**

If the final order is reversed upon the appeal, the appellate court may award restitution to the party injured, with costs ; and it may make an order, or issue any other mandate, necessary to carry its determination into effect. The person dispossessed may also maintain an action, to recover the damages which he had sustained by the dispossession.

§§ 48 and 49, R. S.

Under the statutes before the present Code, the right of appeal to the county court existed, from justices' court, and was concurrent with *certiorari*. *Williams v. Bigelow*, 11 How. 83 ; *People v. Perry*, 16 Hun, 461. But the decision of the District Courts in New York City, or the Marine Court, must be reviewed by *certiorari*. *McIntyre v. Hernandez*, 39 How. 121 ; *Freeman v. Ogden*, 17 Abb. 326. And as the practice then existed no appeal lay to the General Term from the county court. *Carpenter v. Green*, 6 T. & C. 550. As the section now stands the appeals are to be taken in the usual manner in causes tried in the courts where the proceedings are had. In *Shaw v. McCarty*, 63 How. 286, it is said, that an appeal from the present city court must be taken to the General Term of that court, and then to the Common Pleas. A claim for possession of land does not entitle appellant to a new trial on appeal under § 3068. *Brown v. Cassidy*, 34 Hun, 55.

A final order of a district court in summary proceedings obtained by default is appealable to the Court of Appeals, but an order denying a motion to open such default is not appealable. *Jacobs v. Zeltner*, 9 Misc. 455, 61 St. Rep. 104, 30 Supp. 238, 24 Civ. Proc. 45. As to what constitutes reversal under § 2263 of the Code so as to allow a recovery of damages by the person dispossessed, see *Wood v. Kernan*, 57 Hun, 215. Where, on the trial, the petitioner insists that the lease was in writing and disavowed any oral lease, he cannot be heard to say on appeal that his petition was founded upon an oral lease. *Lazarus v. Ludwig*, 17 Misc. 378, 40 Supp. 97. Equity will not interfere to open a judgment in summary proceedings rendered upon default where no fraud or want of jurisdiction is alleged. *Harris v.*

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Treu, 14 Misc. 172, 35 Supp. 379, 25 Civ. Pro. 92, 69 St. Rep. 809. The return upon an appeal from a final order in summary proceedings should set forth all that took place prior to the signing of such order, but should not contain any matters that transpired thereafter. *Blyss v. Coryell*, 23 Misc. 477, 51 Supp. 934, 85 St. Rep. 934. A judgment entered in a summary proceeding instead of a final order, while defective in form, is not absolutely void so as to prevent an appeal being taken therefrom. Co. Ct. 1898. *Wands v. Robarge*, 24 Misc. 273, 53 N. Y. Supp. 700, 87 St. Rep. 700.

The Court of Common Pleas has power to order a new trial in reversing a final order of a district court in summary proceedings. *Moench v. Young*, 16 Daly 143, 18 Civ. Pro. 259, 30 St. Rep. 430, 9 Supp. 637. The liability of sureties on an undertaking given on appeal by the terms of which they covenant to pay all rents accruing or to accrue, not exceeding a fixed sum, covers the time which the appeal has actually kept lessors out of possession. *Rosenquest v. Noble*, 21 App. Div. 583.

An appeal to the county court of itself merely transfers the case to that court for hearing, but does not stay the warrant. *Sage v. Harpending*, 34 How. 1. Only a single appeal by all the parties aggrieved is necessary. *People v. Gildersleeve*, 6 Week. Dig. 460; *Schenck v. Prame*, 63 How. 165. The right to a stay of proceedings on appeal from a final order only exists where the tenants holds over after default in the payment of rent, not where the demised premises are used for an alleged illegal purpose. *Shaw v. McCarthy*, 2 Civ. Pro. 235.

Precedent for Undertaking to Obtain Order for Stay.

Before Hon. William S. Renyon, *County Judge*.

In the Summary Proceedings, wherein
Lamont Johnson is landlord,

agst.

Daniel Hinkley, tenant.

WHEREAS, On the 17th day of July, 1887, in proceedings under the Code of Civil Procedure in relation to summary proceedings to recover the possession of real property, Lamont Johnson, the petitioner, as landlord, obtained a final order against Daniel Hinkley, awarding the said Johnson possession of the premises (here insert

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description), establishing a default in the payment of rent amounting to the sum of \$250, and allowing the said Lamont Johnson the sum of \$25, costs, and the above-named Daniel Hinkley feeling aggrieved thereby, has appealed from the said final order to the county court of the county of Ulster, and the said Daniel Hinkley having given the necessary security upon the said appeal: Now, therefore, we, the said Daniel Hinkley, Julius Graham, and Simon Kline, all of the city of Kingston, in the county of Ulster, do for the purpose of obtaining an order from the county judge, staying the issuing and execution of the warrant in said proceedings, pursuant to the provisions of § 2262 of the Code of Civil Procedure, hereby undertake in the sum of \$500, that if upon the said appeal a final determination is rendered against the said Daniel Hinkley, that the said Daniel Hinkley will pay to the said Lamont Johnson all rent accruing or to accrue upon the said premises (or if there is no lease), the value of the use and occupation of the premises subsequent to the institution of the special proceedings.

Dated August 17, 1887.

(Add justification and acknowledgment in usual form.)

Indorsed:—"I hereby approve of the amount of the within undertaking and the sufficiency of the sureties thereon."

(Signed.)

Precedent for Order to Stay Execution.

(Caption usual form.)

(Title.)

It having been made to appear by Lamont Johnson, that on the 12th day of July, 1887, in summary proceedings to recover the possession of real property, the said Lamont Johnson, as landlord, obtained a final order against Daniel Hinkley, awarding the said Lamont Johnson the possession of the premises known as (here describe premises), and establishing a default in the payment of rent; and it further appearing that the said Daniel Hinkley has appealed from the said final order to the county court of this county, and has given the usual security upon such appeal, and has also given an undertaking to obtain a stay, according to the requirements of § 2262 of the Code of Civil Procedure in a sum and with sureties which have been approved by me: Now, therefore, on motion of De Witt Ostrander, attorney for the said Daniel Hinkley, it is hereby ordered that the issuing and execution of the warrant upon the final order be, and the same is hereby, stayed until the final determination of the said appeal.

WILLIAM S. KENYON.

County Judge.

Where the proceeding is reversed on the ground of the insufficiency of the landlord's affidavit, if there is nothing in the affidavit to enable the court to determine the rights of the parties, it is the duty of the court to award restitution and leave the parties to assert their rights in the legal way. *Wolcott v. Schenck*, 16

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How. 449; *People v. Matthews*, 38 N. Y. 451. But on the other hand it is said, in *People v. Hamilton*, 15 Abb. 328, affirmed on another point, 39 N. Y. 107, that on a reversal of a judgment in the landlord's favor, restitution will not be awarded where the judgment is on the ground of irregularities, and it appears that the landlord should again prevail in regularly conducted proceedings. Restitution will not be ordered after the tenant's right of possession has expired. *Chretien v. Doney*, 1 N. Y. 419; *People v. Gedney*, 15 Hun, 475. But again in *People v. Lockwood*, 3 Hun, 304, it is held that, although the judgment of the justice may be reversed for error, yet if the right to the possession is not clear, restitution will not be awarded or costs given. Restitution will not be ordered in favor of a person not a party to the proceeding. *People v. McCaffery*, 42 Barb. 530. The parties on reversal are restored to the position they occupied before the proceedings were instituted. *Hayden v. The Florence Machine Co.*, 54 N. Y. 221. Where restitution has been awarded, and the decision upon which it was had has been subsequently reversed, a re-restitution will be awarded as of course. *People v. Shaw*, 1 Cai. 125; *Matter of Shotwell*, 10 Johns. 304. Costs may be given whether restitution is awarded or not. *Chretien v. Doney*, 1 N. Y. 419. Plaintiff is entitled to recover such damages as were the direct consequences of defendants' acts. The plaintiff is not bound to gather up the fragments of his scattered and broken chattels; he may recover for money concealed by him on the premises. *Eten v. Luyster*, 60 N. Y. 252. An under-tenant may recover damages, being a tenant under the statute. S. C. 37 Sup. Ct. 486. Damages to plaintiff's business are not recoverable in addition to damages to property. In such an action it is immaterial upon what grounds the decision dispossessing plaintiff was reversed. *Hayden v. Florence Machine Co.*, 54 N. Y. 221. In such an action the process, if regular, protects the officer; but where an under-tenant, who was not a party to the proceedings, was dispossessed, the landlord is responsible. *Croft v. King*, 8 Week. Dig. 179; see *Welch v. Cochran*, 63 N. Y. 181; *Jansen v. Bernard*, 12 Week. Dig. 499.

An order reversing a final order for lack of jurisdiction should provide for the restitution of the tenant. *Bristed v. Harrell*, 21 Misc. 93, 46 Supp. 966. Failure of a person to enter after restitution does not deprive him of the right to recover any loss suf-

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ferred up to that time. *Woods v. Kernan*, 57 Hun, 215, 32 St. Rep. 815, 10 Supp. 654. A tenant who is dispossessed is not restricted to the injuries to goods on removal, but may also recover for loss of use of the premises from the time he was dispossessed until restitution. *Woods v. Kernan, supra*. Where a lease terminated at noon on the first day of May, and summary proceedings were begun on the last day of April, the court will not grant restitution where it appears that a receiver was in possession entitled to the tenant's interest, and that the tenant had nothing but a reversionary interest after the discharge of the receiver. *Marsh v. Masterson*, 15 Daly 114, 3 Supp. 414. On reversal of a final order which awarded petitioner possession of the premises, it appeared that the premises were in the possession of the defendant for a term not yet expired, and it was held that restitution could not be awarded under the provisions authorizing an appellate court to compel restitution of property or a right lost by an erroneous judgment or order, "but not so as to affect title to the transfer in good faith and for value." *Carter v. Anderson*, 13 Supp. 332.

CHAPTER XIV.

CIVIL CONTEMPT.*

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* This subject is treated in an English work, Oswald on Contempt, and also in Rapalje on Contempt.

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ARTICLE I.

POWER OF THE COURT. CIVIL AND CRIMINAL CONTEMPT DISTINGUISHED.

Proceedings to punish for contempt are of two kinds, each having a distinct object in view, the one to protect the rights of private parties, the other to protect the dignity of the court and to punish persons guilty of wilful disobedience of the mandates. In the former case the purpose being to preserve private rights, it is immaterial whether the contempt was designedly or negligently committed, the power and duty of the court to redress the wrongs of the injured party are the same. If, for instance, a person transfer property or do any other act in disobedience of an injunction or other order, it can make no difference to the injured suitor whether it was done innocently or with evil intent. His loss is the same in either event, and proceedings to punish the offender with a view to adjusting the rights of the parties would look to indemnity only. Of course, if the disobedience was wilful, the court could, at the same time that it enforced indemnity, inflict punishment for a criminal contempt; on the other hand, if the only purpose of the proceedings is to punish the prisoner and maintain the dignity of the court, the disobedience must be designed and wilful, and hence the law terms this a criminal contempt. If, for example, one after examination wrongfully interpret and through this mistake disobey an order, the majesty of the law is not offended and the dignity of the court is not impaired, and as he is innocent of wilful offence, the infliction of punishment could have no justification. The wilful disobedience referred to in the statute relating to criminal contempts means conduct intentionally and designedly at variance with the mandate of the court. The disobedience need not be malicious, but it must be in pursuance of an intent to disregard the mandate of the violated order. *People v. Aitken*, 19

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Hun, 327, cited, *Boon v. McGucken*, 67 Hun, 251. The contempt must be such as to defeat, impede, or impair a right or remedy to be punishable. *Sandford v. Sandford*, 2 State Rep. 133; but the rule is otherwise as to a criminal contempt, and a guilty party may be punished without proof that the adverse party has been injured; *Stubbs v. Ripley*, 39 Hun, 626, appeal dismissed, 102 N. Y. 734. The distinction between civil and criminal contempts is given. *Matter of Watson*, 3 Lans. 408; *People v. Cowles*, 4 Keyes, 46; *Hawley v. Bennett*, 4 Paige, 163; *People v. Spaulding*, 10 id. 284; *People v. Hackley*, 24 N. Y. 74; *People v. Restell*, 3 Hill, 289; *People ex rel. Munsell v. Oyer and Terminer of New York*, 101 N. Y. 245. The class of contempts intended to be punished under the provisions of this article does not include criminal contempts, and the codifiers say that they have "deemed it inexpedient to embody the practice relating to criminal contempts in this statute, not only because such a course would be inconsistent with the rules laid down by us for our guidance in this revision, but also because we deem it inexpedient to restrict the courts by statutory provisions to a prescribed mode of procedure, in a matter so important and admitting of such a variety of circumstances with respect to the nature of the offence and the most appropriate method of punishment, as the proceedings necessary for the preservation of their power and dignity."

Contempt is disorderly, contemptuous, or insolent language or behavior in the presence of a legislative or judicial body, tending to disturb its proceedings, or impair the respect due to its authority, or a disobedience to the rules or orders of such a body, which interferes with the due administration of law. Amer. & Eng. Ency. of Law, 1st edit., vol. 3, p. 777, citing *Anderson v. Dunn*, 6 Wheaton (U. S.) 204; *Burdett v. Abbott*, 14 East, 1; Wharton's Crim. Law, § 3426. It is said in *Matter of Yates*, 4 Johnson, 338, that, "It is undoubtedly essential to the due administration of justice that all courts should have power sufficient to enforce obedience to their own orders; hence the necessity of authorizing them to punish contempts, a power resulting from the first principles of judicial establishments, in the constitutional exercise of which they ought to be protected." In *Yates v. Lansing*, 9 Johnson, 394, at page 416, the following language is found in the opinion of a member of the court: "The right of

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punishing for contempts by summary conviction, is inherent in all courts of justice and legislative assemblies, and is essential for their protection and existence. It is a branch of the common law, adopted and sanctioned by our State constitution. The discretion involved in this power is, in a great measure, arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice."

The known existence of such a power prevents, in a thousand instances, the necessity of exerting it; and its obvious liability to abuse is, perhaps, a strong reason why it is so seldom abused. This power extends not only to acts which directly and openly insult, or resist the powers of the court, or the persons of the judges, but to *consequential, indirect, and constructive contempts*, which obstruct the process, degrade the authority, or contaminate the purity of the court. 4 Bl. Com. 280, 2 Hawk. b. 2, c. 22, 1 Com. Dig. Attachment, A. The *officers* of the court are peculiarly subject to its discretionary powers, and may be punished in this summary manner, for oppression, extortion, negligence, or abuse in their official capacity. 1 Bac. Abr. tit. Attachment, 2 Hawk. tit. Attachment, 3 Atk. 563. A contempt is an offence *against the court*, as an organ of public justice, and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, or indictment, or not. To challenge a senator or a judge may, under circumstances, be a contempt, but is certainly indictable. A conviction on indictment will not purge the contempt, nor will a conviction for a contempt be a bar to an indictment. The offence may be *double*; and so are the remedy and the punishment. For instance, assaults in the presence of the court, rescues, extortion, libels upon the court or its suitors relating to suits pending, forging a writ, etc., are *indictable* offences, and certainly they are also *contempts*. The right of every superior court of record to punish for contempt of its authority or process is inherent from the very nature of its organization, and essential to its existence and protection, and to the due administration of justice. The courts of justice of the United States are vested by the express statute provision with power to fine and imprison for contempt. *Anderson v. Dunn*, 6 Wheaton, 204. See, also, *Ex parte Karney*, 7 Wheaton, 38. To fine for contempt, imprison

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for contumacy, enforcing the observances of order, etc., are powers which cannot be dispensed with in the court, because they are necessary to the exercise of all others. *United States v. Hudson*, 7 Cranch, 32. A very considerable degree of confusion has arisen with regard to the different kinds of contempt punishable by the court, and the methods of punishment. Blackstone says: "Contempts that are thus punished are either direct, which openly insult or resist the powers of the court, or the person of the judges who preside there, or else are consequential, which, without such coarse insolence or direct opposition, plainly tend to create a universal disregard of their authority." 4 Black. Com. 283.

As to what constitutes what is known as a criminal contempt, on the one hand, and a civil contempt upon the other, has been the cause of very much discussion in the opinions of the courts, and different rules are laid down as to what constitutes criminal contempt, or civil contempt, as well as different methods adopted for their punishment. Criminal contempts are considered in §§ 8 to 13 of the Code Civ. Proc., inclusive, and § 143 of the Penal Code: While civil contempts are treated, §§ 14, 15, 16, of the Code, and the procedure of enforcing punishment thereof, §§ 2266-2292. As will be noted in further consideration of the subject, different procedure is had where the contempt is committed in view of the court from that which is to be followed where the contempt was not in the direct presence of the court. The distinction as between a civil and criminal contempt is shown in *People v. Cowles*, 4 Keyes, 38. Woodruff, J., in the opinion of the court, says: "The distinction between a commitment upon a precept issued for the disobedience of an order for the payment of a sum of money and a commitment upon a conviction of misconduct, punishable by fine and imprisonment, is very clearly indicated by the statute, and has been repeatedly declared by the courts. The proceedings are unlike, and the decision and penalties imposed are different." The distinction is plainly put in the further language of the court: "The process in the former case (civil contempt) is strictly and purely remedial; in the latter (criminal contempt) it is punitive, and in most instances purely so." A criminal contempt is one which tends to bring the administration of justice into disrepute, and where the guilty party is punished with a view to maintaining the

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dignity of the court. A civil contempt is, and can be used only, for the protection of individual rights, and for preventing a disobedience of the process of the court to the injury of a party to the proceeding. In *People ex rel. Negus v. Dwyer*, 90 N. Y., at page 406, Finch, J., makes the same distinction: "The Revised Statutes distinguished and the Civil Code preserves the distinction between criminal contempts and proceedings as for contempt in civil cases." As respects disobedience to the orders of the court, the sole difference appears to be that a wilful disobedience is a criminal contempt, while a mere disobedience, by which the right of a party to an action is defeated or hindered, is considered otherwise.

The matter is very fully treated in *People ex rel. Munsell v. Court of Oyer and Terminer in the City of New York*, 101 N. Y. 245, in which Judge Finch says, referring to civil contempt (page 248, opinion): "If, in this class of cases, there exist traces of a vindication of public authority, they are but faint and utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperilled or indemnity for such rights defeated." At pages 247 and 248, Judge Finch defines the different kinds of contempt as follows: "In one class are grouped cases whose occasion is an injury or wrong done to the party who is a suitor before the court, and has established a claim upon its protection, and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or of property. This clearly appears from the mode of enforcing the suitor's remedy prescribed by the statute." Code of Civ. Proc. §§ 2284, 2285. A fine may be imposed to indemnify his actual loss. Where such is not shown, the fine must not exceed his costs and expenses and \$250 in addition thereto, and in both cases be paid over to the suitor. Further, page 248: "The second class of contempts consists of those whose cause and

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result are in violation of the rights of the public, as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases, if a fine is imposed, its maximum is limited by a fixed general law, and not at all by the needs of individuals; and its proceeds when collected go into the public treasury and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily these contempts in their origin and punishment partake of the nature of crimes which are violations of the public law and end in the vindication of public justice, and hence are named criminal contempts. As described in the statute, an element of wilfulness or of evil intention enters into and characterizes them. They are a disturbance of the court which interferes with its performance of duty as a judicial tribunal; wilful disobedience to its lawful mandate; resistance to such mandate wilfully offered; contumacious and unlawful refusal to be sworn as witness, or to answer a proper question, and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of 'general powers of the courts and their attributes,' and they very evidently relate to public offences tending to cast discredit upon the administration of public justice, and having no reference to the particular rights of suitors. But here again we find that they occur as well in civil as in criminal actions, and so, for convenience, we may speak of them, in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged." Referring to this decision, in *King v. Barnes*, 113 N. Y. 476, at p. 480, Judge Finch, again speaking for the court, says: "It is true, as we have elsewhere said, that the main line of distinction between the criminal and civil contempts is that the one is an offence against public justice, the penalty for which is essentially punitive, while the other is an invasion of private right, the penalty for which is redress or compensation to the suitor. But we also pointed out this distinction, while marked and obvious, was not complete and perfect, since behind criminal contempts often stood some trace of private rights, and in civil contempts

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was occasionally to be found the element of punishment merely as distinguished from the bare enforcement of a remedy." In civil contempts it is essential to sustain a conviction that there shall exist not only jurisdiction in the court or officer granting the order which has been disobeyed, but also a valid cause of action in the aggrieved party, and this results from the fact that the civil contempt is not an offence against the dignity of the court, but against the party in whose behalf the mandate of the court has been issued, and a fine is imposed solely as indemnity to the injured party. It is otherwise in case of criminal contempt that is of a public character and indictable ; it is directed against the dignity and authority of the court alone. So in proceedings to prosecute such an act the court will look only to the question of power, and if there were question of the power to grant the order, it will impose punishment upon those who wilfully disobey it, for the purpose of vindicating its own power and maintaining its own dignity. Criminal contempts consist in a violation of the rights of the public as represented in their judicial tribunals. An element of wilfulness exists in them, and they are punished in the interest of public justice, and not of individual litigants. Civil contempts need not be wilful, and they are punished by a fine to the individual litigant as an indemnity for his loss. Conviction of a civil contempt involves a judicial determination that the party's rights or remedies have been defeated or impaired by the contempt. *People ex rel. Gaynor v. McKane*, 78 Hun, 154.

ARTICLE II.

WHAT IS CIVIL CONTEMPT ; HOW PUNISHABLE. §§ 2266, 2292, 14, 15, 16, 1241, 2457, 2555.

SUB. 1. CIVIL CONTEMPTS GENERALLY. §§ 14, 15, 16, 2266, 2292.

2. HOW JUDGMENT ENFORCED BY CONTEMPT PROCEEDINGS. § 1241.

3. CONTEMPTS IN SUPPLEMENTARY PROCEEDINGS. § 2457.

4. CONTEMPT PROCEEDINGS TO ENFORCE SURROGATE'S DECREES. § 2555.

SUB. 1. CIVIL CONTEMPTS GENERALLY. §§ 14, 15, 16, 2266, 2292.

§ 2266. Cases to which this title applies.

In a case specified in § 14 of this act, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a

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contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded, or prejudiced thereby, the offence must be punished as prescribed in this title.

See § 870.

§ 2292. [Am'd, 1895.] Punishment of misconduct at trial term.

Where a misconduct, which is punishable by fine or imprisonment, as prescribed in this title, occurs at a trial term, or with respect to a mandate returnable at such term, and was not punished at the term at which it occurred; the Supreme Court may inquire into and punish the misconduct, as if it had occurred at a Special Term of the Supreme Court, held in the same county, or with respect to a mandate returnable at such a Special Term.

2 R. S. § 33; L. 1895, ch. 946.

§ 14. Contempts punishable civilly.

A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases:

1. An attorney, counsellor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

4. A person, for assuming to be an attorney or counsellor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining, or fraudulently and wilfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein.

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.

7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court.

8. In any other case, where an attachment, or any other proceeding to punish for a contempt, has been usually adopted and practised in a court of record, to enforce a

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civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

2 R. S. 534, part 3, ch. 8, tit. 13, § 1 (3 R. S., 5th ed., 849; 2 Edm. 552).

§ 15. [Am'd, 1877.] **No punishment for non-payment of interlocutory costs.**

But a person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by State writ, except where an attorney, counsellor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance.

L. 1847, ch. 390, § 2 (3 R. S., 5th ed., 126; 4 Edm. 630).

§ 16. **Id. ; money due upon a contract.**

Except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order, requiring the payment of money due upon a contract, express or implied, or as damages for non-performance of a contract.

L. 1831, ch. 360, § 1 (3 R. S., 5th ed., 126; 4 Edm. 465), am'd.

The work undertaken by the codifiers in this chapter is a revision of a portion of part 3, chapter 8, title 13, of the Revised Statutes, relating to the contempts which infringe upon the rights or remedies of the parties, and are punishable at his instance and particularly with a view to his compensation.

The right of a court of record to punish contempts is a common-law right, and a necessary incident to the powers of the court. This is specially true of contempts committed in the presence of the court, and corporations, as well as individuals, are within the scope of its powers. *People v. Sturtevant*, 9 N. Y. 263; *People v. Phelps*, 4 T. & C. 467; *Spaulding v. People*, 7 Hill, 301; *Wicker v. Dresser*, 13 How. 331; *Yates v. Lansing*, 9 Johns. 395; *People v. Albany, etc., R. R. Co.*, 12 Abb. 171; *Hillis v. Peckskill Savings Bank*, 18 Week. Dig. 287. The power to punish for contempt is, however, an exception to the provisions of the Constitution in favor of personal liberty, and cannot be extended in the least degree beyond the limits imposed by statute. *Rutherford v. Holmes*, 5 Hun, 317, affirmed, 66 N. Y. 368; *People v. Riley*, 25 Hun, 588. This summary right of the courts under the common law to punish a delinquent officer for disobedience to its lawful order has not been restricted by statute. *Clark v. Bininger*, 43 N. Y. Super. 126, affirmed, 75 N. Y. 344; *People v. Dwyer*, 63 How. 115; *Stevenson v. Hanson*, 67 id. 305. The inferior courts have power at common law to protect their proceedings from disorder, to order the arrest and

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removal of disorderly persons, etc., and such order exonerates the person executing it from liability for false imprisonment. *Matter of Watson*, 3 Lans. 408. The operation of § 14 is, however, specifically confined to "a court of record, or a judge thereof, or a referee appointed by the court." A judge out of court, however, has no power to punish for contempt on disobedience to an order made in a statutory proceeding before him, unless authority so to punish is expressly conferred by law. *People v. Brennan*, 45 Barb. 344. This contingency is, however, provided for by this section. It has also been said that, on the other hand, the court in term time cannot punish, as for a contempt, disobedience of an order made by a judge out of court, unless the order is made in an action pending in the court. *People v. Brennan*, *supra*. But in *Tremain v. Richardson*, 68 N. Y. 617, it is held that the court has power to punish for a contempt of an order made by a county judge in supplementary proceedings in the Supreme Court. The right to process to punish for contempt is within the discretion of the court, and will not be exercised where there is another adequate remedy on behalf of a party, nor is its refusal reviewable by appeal. *Troy & B. R. R. Co. v. Hoosac Tunnel R. R. Co.*, 57 How. 181. The tendency of the courts has been in modern times to restrict the definitions of contempts and narrow their own powers in respect to them. *Bergh's Case*, 16 Abb. (N. S.) 266; *People v. Jacobs*, 66 N. Y. 8. The history of punishment for contempt is considered and discussed in *Dusenbery v. Woodward*, 1 Abb. 443. Disobedience to a lawful order of a court or judge is a contempt, and an order is binding until reversed, unless void for want of jurisdiction; but if erroneous only, that fact will be considered in mitigation of the punishment. *Hilton v. Paterson*, 18 Abb. 245; *People v. Bergen*, 53 N. Y. 404; *Moat v. Halbein*, 2 Edw. Ch. 188; *People v. Sturtevant*, 9 N. Y. 263; *Sullivan v. Judah*, 4 Paige, 442; *Perry v. Mitchell*, 5 Den. 537; *Eric Railway Company v. Ramsey*, 45 N. Y. 637; *Higbie v. Edgerton*, 3 Paige, 253; *People v. Spaulding*, 2 id. 326; *Smith v. Reno*, 6 How. 124.

If a judgment is erroneous the remedy is to move to modify. *Park v. Park*, 80 N. Y. 156. That an injunction is too broad, and partially beyond the jurisdiction of the court, is no excuse as to those matters as to which the court has jurisdiction. *Atlantic & Pacific Tel. Co. v. B. & O. R. R. Co.*, 46 N. Y. Super. 377, modified, 87

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N. Y. 355. But violation of a void injunction order is not a contempt. *People v. Edson*, 52 N. Y. Super. 53. Nor is it an excuse that the order is broader than the prayer of the complaint. *Mayor v. N. Y. & S. R. R. Co.*, 64 N. Y. 622, affirming 40 N. Y. Super. 301. Or that the referee before whom a debtor was to be examined was hostile to him. *Tremain v. Richardson*, 68 N. Y. 617. Or after examination that the affidavit on which the proceedings were based was informal. *Lehmaier v. Griswold*, 46 N. Y. Super. 11. An appeal from the order, without a stay, does not justify its violation. *Stone v. Carlan*, 2 Sandf. 738; *People v. Bergen*, 53 N. Y. 404; *Leland v. Smith*, 11 Abb. (N. S.) 231; *Troy & B. R. R. Co. v. B. & H. R. R. Co.*, 57 How. 181. The direction of a third person will not protect a party from punishment, though it may bear on the extent of the punishment, as will the advice of counsel. *Krom v. Hogan*, 4 How. 225; *Matter of Fitton*, 16 id. 303; *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; *Hawley v. Bennett*, 4 Paige, 163; *Rogers v. Patterson*, id. 450; *Billings v. Carver*, 54 Barb. 40; *Lansing v. Easton*, 7 Paige, 364; *People v. Compton*, 1 Duer, 512; *Taggard v. Talcott*, 2 Edw. Ch. 628; *Hilliker v. Hathorn*, 5 Bosw. 710. The submission to an examination by a debtor, after violation, is a mitigation of punishment. *Hilton v. Patterson*, 18 Abb. 245. As to a proper excuse, see *Smith v. Drury*, 22 Week. Dig. 3. It has been intimated that the process will not ordinarily issue to collect money where there is a fund in hand out of which payment ought to be made. *Matter of Watson v. Nelson*, 69 N. Y. 536. And it is held proper only in cases where the moneys cannot be collected by execution. *Baker v. Baker*, 23 Hun, 56; *People v. Riley*, 25 id. 587; *O'Gara v. Kearney*, 77 N. Y. 423. Where the failure to pay is from inability, see *Cochran v. Ingersol*, 13 Hun, 368. But where a party is unable to pay over the moneys by reason of his own fault it is no defence. *Lansing v. Lansing*, 41 How. 248. A copy of the order or judgment must be served. *Park v. Park*, 80 N. Y. 156. And a demand must be made for payment of money to put a party in contempt. *Grey v. Cook*, 34 How. 432; *McComb v. Weaver*, 11 Hun, 271; *Fischer v. Raab*, 81 N. Y. 235. And by the person entitled to receive it. *Panton v. Zebley*, 19 How. 394; *People v. King*, 9 id. 97; *Tinkey v. Langdon*, 60 id. 180. Until service of a copy of the order is made a party cannot be brought in contempt for not complying with its direction. *Sandford v.*

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Sandford, 2 State Rep. 133; *McCauley v. Palmer*, 40 Hun, 38. It must be made to appear that the act or omission complained of is one by which "the right or remedy of a party may be defeated, impaired, impeded, or prejudiced," and this must be adjudged to authorize the infliction of punishment. *Fischer v. Raab*, 81 N. Y. 235. To punish a party for contempt in a civil proceeding the contempt must be such as to defeat, impair, impede, or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed. *Sandford v. Sandford*, 2 St. Rep. 133; *Cleary v. Christie*, 41 Hun, 566. In supplemental proceedings the judge has power to punish disobedience, and this power does not oust the court of its jurisdiction to punish for the contempt. *Matter of Smethurst*, 3 Sandf. 724; *Kearney's Case*, 13 Abb. 459. Even an erroneous order must be obeyed. *Wilcox v. Harris*, 59 How. 262. It was held that the fact that the debtor is a laborer, having a family wholly supported by his labor, will not authorize disobedience. *Newell v. Cutler*, 19 Hun, 74. This case was, however, overruled. *Hancock v. Sears*, 93 N. Y. 79. Where, pending the proceedings, the debtor allows a fictitious judgment to be rendered against him, and execution to be levied on land belonging to him in another State, he is punishable for contempt. *Fenner v. Sanborn*, 37 Barb. 610. A party will not be punished for refusing to pay over money or deliver property, pursuant to an order, unless the money or specific property was, at the time of the service of the order for the examination, in his possession or under his control. *Tinker v. Crooks*, 22 Hun, 579; *Potter v. Low*, 16 How. 549; *Gerregani v. Wheelright*, 3 Abb. (N. S.) 264. Repayment of funds received by a party to an action for a partnership accounting from a receiver therein cannot, upon reversal of the judgment under which it was paid, be recovered back by proceedings for contempt. *Schulte v. Anderson*, 48 N. Y. Super. 133. An assignee for the benefit of creditors cannot, like a receiver, be punished for contempt for not complying with an order to pay out moneys in his hands. *Matter of Radtke*, 16 Week. Dig. 28. An order should not be granted for the arrest and imprisonment of a party who had obtained an attachment against property for his failure to pay the sheriff's charges, as fixed by an order vacating the attachment. *Hall v. U. S. Reflector Co.*, 66 How. 31; see *Myers*

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v. *Becker*, 95 N. Y. 486. A final decree on an accounting by a general assignee cannot be enforced by proceedings for contempt. *Matter of Stockbridge*, 7 Abb. N. C. 395.

A third party will not be punished for refusing to comply with an order that he turn over property of the judgment debtor in his hands to the receiver ; the receiver must bring suit. *West Side Bank v. Pugsley*, 12 Abb. (N. S.) 28 ; s. c. 47 N. Y. 368. Disobedience to an injunction order will be punished as a contempt, and it is not necessary that service of the order should have been made if the person violating it has knowledge it has been granted. *Mayor v. N. Y. & S. I. Co.*, 40 N. Y. Super. 300, affirmed, 64 N. Y. 623 ; *People v. Brower*, 4 Paige, 405 ; *Neale v. Osborne*, 15 How. 81 ; *Wheeler v. Gilsey*, 35 id. 139 ; *Atlantic Tel. Co. v. Baltimore, etc., R. R. Co.*, 46 N. Y. Super. 377 ; *Ewing v. Johnson*, 34 How. 202 ; *Waffle v. Vanderheyden*, 8 Paige, 45. But damages may be recovered in an action for such violation, or proceedings taken for contempt, at the election of the injured party. *Porous Plaster Co. v. Seabury*, 43 Hun, 611. The court will not countenance any evasion of the injunction order, and will punish an intentional violation of its fair intent. *Mayor v. N. Y. & S. I. R. R. Co.*, 64 N. Y. 622 ; *Ogden v. Gibbons*, 4 Johns. Ch. 174 ; *Devlin v. Devlin*, 69 N. Y. 212 ; *Neale v. Osborne*, 15 How. 81 ; *Wheeler v. Gilsey*, 35 id. 139. Service on the mayor of a city or president of a corporation binds the officers of each. *People v. Sturtevant*, 9 N. Y. 263 ; *Rorke v. Russell*, 2 Lans. 242. Officers of a corporation who have personal knowledge that a corporation is enjoined, and nevertheless violate the injunction, are punishable. *Abell v. N. Y., etc., R. R. Co.*, 18 Week. Dig. 554 ; *People v. Albany, etc., R. R. Co.*, 12 Abb. 171. But the order must clearly embrace the act complained of to entitle the person injured to process for contempt. *German Savings Bank v. Habel*, 58 How. 336 ; *Kennedy v. Weed*, 10 Abb. 62. To render a person guilty of a contempt for resisting "a lawful mandate of a court of record," the mandate must have been issued by a court and not by a justice thereof. *People v. Gilmore*, 26 Hun, 1. A peremptory mandamus is an order of the court. *People v. R. & S. L. R. R. Co.*, 76 N. Y. 294. It is sufficient excuse when an act has been directed by mandamus to show that an injunction has been granted restraining the same act. *People v. Village of West Troy*, 25 Hun, 179. Unless the order directs

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surrender of premises, as well as a conveyance, a party cannot be punished for refusing to deliver possession. *Tinkev v. Langdon*, 60 How. 180; *McKelsey v. Lewis*, 3 Abb. N. C. 61. A person sued by a wrong name will not be punished for contempt for failing to obey an order if he has not appeared in the action. *Muldoon v. Pierz*, 1 Abb. N. C. 309. It is not a contempt to fail to pay costs in an action between husband and wife, as costs are collectible by execution. *Noland v. Noland*, 29 Hun, 630; *Jacquin v. Jacquin*, 36 id. 378. But when a defendant fails to make a payment of alimony he is liable for contempt. It is not necessary to show an execution returned unsatisfied. *Ryckman v. Ryckman*, 34 Hun, 235, affirmed, 98 N. Y. 639. The rule is changed from the Revised Statutes, and the court must be satisfied that payment cannot be compelled by sequestration or requiring security before proceedings can be taken for contempt. *Isaacs v. Isaacs*, 61 How. 369; *Rahl v. Rahl*, 14 Week. Dig. 560. It was held before the Code, *Matter of Clark*, 20 Hun, 551, appeal dismissed, 81 N. Y. 638, that one committed for non-payment of alimony was not entitled to the jail liberties. The payment of alimony, either temporary or permanent, and of the wife's legal expenses in an action for divorce, may be enforced by proceedings for contempt, but the husband must be served with a certified copy of the decree and payment of the alimony demanded before the proceedings can be had. *Strobridge v. Strobridge*, 21 Hun, 288; *Ryckman v. Ryckman*, 19 Week. Dig. 41; *Sandford v. Sandford*, 2 State Rep. 133. *Contra*, *Gane v. Gane*, 45 N. Y. Super. 355. To bring a party into contempt, the order which he is charged with violating must be served personally upon him. *McCauley v. Palmer*, 40 Hun, 38; *Loop v. Gould*, 17 id. 585; *Gerard v. Gerard*, 2 Barb. Ch. 73; *People v. Murphy*, 1 Daly, 462. It is no answer to the proceedings for contempt that the pecuniary circumstances of the defendant are such that he is unable to comply with the order. *Lansing v. Lansing*, 41 How. 248; *Strobridge v. Strobridge*, *supra*. An injunction restraining a party from suing executors is not violated by suing heirs at law. *Dale v. Roosevelt*, 1 Paige, 35. After service of an ordinary injunction in a creditor's suit, defendant is not guilty of contempt in proceeding to judgment in a suit already commenced. *Parker v. Wakeman*, 10 Paige, 485.

An injunction obtained by a partner, preventing other partners

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from meddling with the partnership property, will not prevent the creditors of the firm from proceeding at law to recover their debts, or an injunction of the firm from confessing a judgment, so as to give a creditor a preference. *McCredie v. Senior*, 4 Paige, 378. An attorney having two clients, if one is enjoined, it does not limit his professional action as to the other claiming different rights and interests. *Slater v. Merritt*, 75 N. Y. 268. Among the acts adjudged to be contempts are the taking of property from an officer when seized on mesne, but not on final process. *People v. Church*, 2 Wend. 262. Breaking open parts of books sealed up and delivered to a party for inspection. *Dias v. Merle*, 2 Paige, 494. Writing an insulting letter to a grand jury. *Bergh's Case*, 16 Abb. 266. Interfering with property in the possession of a receiver. *Riggs v. Whitney*, 15 Abb. 388; *Noe v. Gibson*, 7 Paige, 513. See on this point, also, *Albany City Bank v. Schemerhorn*, 9 Paige, 372; *Baker v. Browning*, 8 id. 388; *Hilliker v. Hawthorne*, 5 Bosw. 710; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565. Procuring an insolvent person to justify as bail. *Hall v. L'Platimer*, 49 How. 500. Bringing a suit against a lunatic or habitual drunkard after notice of injunction, or against a receiver. *L'Amoureux v. Crosby*, 2 Paige, 422; *Riggs v. Whitney*, 15 Abb. 388; *Noe v. Gibson*, 7 Paige, 513. See *People ex rel. Borst v. Grant*, 41 Hun, 351. The surrogate has power to punish an administrator for contempt because of his failure to pay the amount allowed to a special guardian by a decree, and an allegation of inability to pay is no answer. *Matter of Kurtzman*, 2 State Rep. 655. As to when surrogate can exercise discretion. *Matter of Snyder*, 2 State Rep. 758. Sureties wilfully justifying in a larger sum than they are worth are guilty of contempt. *Egan v. Hope*, 49 N. Y. Super. 454; *Stephenson v. Hanson*, 6 Civ. Pro. 43; reversed on appeal on ground facts did not justify finding of falsity of affidavit; 22 Week. Dig. 274; *Keating v. Goddard*, 8 Civ. Pro. 377, n.; *Diamond v. Knoepfel*, 3 State Rep. 291. But *contra*, *Simon v. Aldine Co.*, 5 id. 906. But not if error might have been made by supposing demands against him not collectible. *Nathan v. Hope*, 5 Civ. Pro. 401. Refusal to answer by a witness is not less punishable civilly because it might be punished criminally. *Matter of Jones*, 6 Civ. Pro. 250. But although a witness will be compelled to answer, he will not be obliged to sign a deposition

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when it might subject him to legal liability. *Marx v. Spaulding*, 6 State Rep. 530. It seems that where a judgment of divorce prohibits the party in fault from marrying again, he may be punished for contempt for disregarding the provision by afterward marrying in another State. *Ryer v. Ryer*, 67 How. 369. A surrogate has no jurisdiction to punish for contempt in not complying with a decree directing the payment of money until an execution has been returned unsatisfied in whole or part. *Matter of Dissosway*, 91 N. Y. 235. A sheriff who has acted in good faith should not be punished as for contempt for a mistake of law. *Second National Bank of Oswego v. Dunn*, 63 How. 434. The interposition of a verified answer by a defendant, knowing it to be false, is not a contempt. *Moffatt v. Herman*, 17 Abb. N. C. 107, reversing *id.* 62. See *People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245, for discussion as to contempt in view of court. An answer may be stricken out for refusal to obey an order of the court. *Clark v. Clark*, 1 State Rep. 287; *Clark v. Clark*, 11 Civ. Pro. 7. When judgment enforced by proceedings for contempt. *Diffenbach v. Roch*, 22 Week. Dig. 282.

Where a court has jurisdiction of the subject-matter and to grant a preliminary injunction, an order made must be treated as a valid and binding order of the court, and as such obeyed until revoked by subsequent order made in the same action. This applies to criminal contempts. *People ex rel. Gaynor v. McKane*, 78 Hun, 154. Under subdivision 4, § 14, any person who interferes with the process, control, or action of the court in a pending litigation unlawfully and without authority is guilty of a civil contempt if his act defeats, impairs, impedes, or prejudices the rights or remedy of a party to such action or proceeding. The advising and procuring the disobedience of a judgment is a contempt, and where the offence was an affirmative act of resistance to the process of the court, and an active effort to defeat its orders and make its judgment nugatory, it was properly punished even though the act required had been performed. *King v. Barnes*, 113 N. Y. 476, 23 St. Rep. 263, affirming 51 Hun, 551, 4 Supp. 247. It was held in the Supreme Court that it did not excuse disobedience of the order made within the jurisdiction of the court if the party was advised and believed that it was invalid. Citing *Fischer v. Langbein*, 103 N. Y. 84; *Day v. Bach*, 87 N. Y. 56. The rule that it is no answer to proceedings for con-

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tempt in violation of an injunction that the injunction was improvidently granted was reiterated. *Kochler v. Farmers & Drovers' National Bank*, 6 Supp. 470, cited, *People v. Bergen*, 53 N. Y. 404; *Clark v. Biningcr*, 75 N. Y. 344; *People v. Dwyer*, 90 N. Y. 402. See, however, *Krone v. Kings Co. Elevated Railroad Co.*, 50 Hun, 441, 3 Supp. 149. The rule in *Hull v. Thomas*, 3 Edw. Chanc. 236; *Livingston v. Swift*, 23 How. Pr. 1, that persons having knowledge of the injunction are punishable for its disobedience so far as it is necessary to indemnify the party injured by their disobedience, although never served upon them, was followed in *Kochler v. Farmers & Drovers' National Bank*, 6 Supp. 470. In *People ex rel. Cauffman v. Van Buren*, 136 N. Y. 252, the violation of an injunction order is considered in connection with the question of contempt. It is held that unless such an order is void upon its face for lack of jurisdiction on the part of the judge granting it, the party disobeying it may properly be adjudged guilty of contempt, however erroneous the granting of the order may have been; unless there was an entire absence of judicial authority to act it is the duty of the party to obey it until it is revoked. A person who, after the court has decided to restrain the doing of an act, with knowledge of the decision, does the act, may be punished for contempt, although the decision of the court has not been formulated by the order or writ. *People ex rel. Platt v. Rice*, 144 N. Y. 249. In order that a commitment for a contempt may issue for the disobedience of a judgment or order, the precise thing to be done by the party proceeded against must be stated in the judgment or order; there should be no opportunity for ambiguity. Party should be adjudged to do a specific act. *Ross v. Butler*, 19 Civ. Pro. 152. A defendant directed by a judgment to pay a sum of money is not in contempt until after the service upon him of a certified copy of the judgment; service upon his attorney is not sufficient to bring him into contempt, and the fact that he is aware of the judgment and has appealed from it and recognized its existence in other ways is entirely immaterial. While it seems a party may be punished for contempt in violating an order or judgment of which he has notice, he cannot be punished for failing to do something that he is commanded to do except in the manner specified in the statute. *Pittsfield National Bank v. Tailer*, 23 Civ. Pro. 48.

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It is said in *People ex rel. Platt v. Rice*, 144 N. Y. 249, that it is no new principle that a person may be held guilty of a contempt for doing an act after the court had decided to enjoin its doing, although that decision had not been formally and technically carried out, or formulated into an order or writ ; it is further held that it is not sufficient excuse, where parties have neglected or disobeyed an order, to say there was no jurisdiction to make such an order, so held in case where it was held there was a stipulation. The court, having acquired jurisdiction of the action and issued an injunction, may punish its violation, although the parties are both non-residents, and some of the acts complained of were done outside the State. *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun, 443, 20 St. Rep. 923, 4 Supp. 348, affirming 2 Supp. 682. The order requiring an officer of the court to pay moneys in his hands, as such officer, into court, need not be accompanied by a special commitment, but failure to comply with the order is a contempt. *Whitman v. Haines*, 21 St. Rep. 41, 4 Supp. 48. Where a referee in foreclosure failed to comply with the order, requiring him to pay surplus to the treasurer, and to file his report, it was held that an order was proper adjudging him guilty of contempt, prejudicing the rights of the parties, fining him, and directing his commitment, until payment and compliance with the first order. *Steele v. Gunn*. 3 Supp. 692, 19 St. Rep. 654. Costs directed to be paid by judgment in a matrimonial action can be enforced by contempt, if it appears to the satisfaction of the court that payment cannot be enforced by means of any security given or by sequestration or execution. *Cockefair v. Cockefair*, 23 Abb. N. C. 219. A defendant in an action for divorce, who has been imprisoned for contempt for non-payment of alimony, and remained in custody for the full term permitted by § 3, cannot be again imprisoned for non-payment of other sums of money afterward becoming due as alimony under the same judgment. *Winton v. Winton*, 16 Civ. Pro. 337, 53 Hun, 4, 5 Supp. 537. Where an order requires a purchaser at a foreclosure sale to complete the purchase, and the purchaser refuses to obey, the court has power and should, under §§ 2266 and 2268, punish such disobedience as a contempt, and should make an order under § 2268 directing that a warrant issue, committing the person to prison until the order is complied with. *Burton v. Lynn*, 21 App. Div. 609. The

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court will not punish as for contempt a violation of an injunction committed pending an appeal from the injunction order. *N. Y. M. & T. Co. v. Shea*, 23 Misc. 15, 49 Supp. 951, 83 St. Rep. 951. It is doubtful whether the court has power to punish a person for abuse of its process in preferring unfounded charges of professional malfeasance against an attorney for the purpose of procuring his disbarment. *Matter of Dunn*, 27 App. Div. 371, 50 Supp. 163, 84 St. Rep. 163. The court has power to punish as a contempt the act of a surety in becoming such upon an undertaking given in the action at a time when he knows he is insolvent, and has no expectation of paying the liability thus incurred. *Simon v. Aldine Publishing Co.*, 12 Civ. Pro. 290, reversing 11 Civ. Pro. 267. The contrary, however, is held in *Norwood v. Ray Manufacturing Co.*, 11 Civ. Pro. 273. It is not sufficient to protect a party against punishment under § 2284, for failure to pay over moneys pursuant to an order made upon the accounting as trustee, to show that an action may be maintained for the same cause, but it must be shown to be a case where the law has specially prescribed the action as a means of redress. *Matter of Morris*, 45 Hun, 167. Where a trustee has been adjudged guilty of contempt because of failure to pay over moneys received by him in that capacity, the court may impose, as a fine, the amount which he has received and failed to pay, and direct him to be imprisoned until he shall pay the fine. *Matter of Morris*, 45 Hun, 167. It was held in this case that it was doubtful whether any allowance by way of costs and expenses could be made in contempt proceedings, and still further that no allowance can be made for counsel fees. A defendant in an action for divorce, who leaves the State on granting of an order requiring him to pay alimony to plaintiff, and neglects to obey the order, is guilty of contempt, and the court is authorized to strike out his appearance and answer, direct a reference, and allow the action to proceed as if defendant had not appeared or answered ; and while in contempt he cannot apply to the court to have any of the proceedings against him set aside for irregularity. *Quigley v. Quigley*, 45 Hun, 23. The advice of his attorney that the injunction is illegal will not justify or excuse the party enjoined in violating the injunction. *Capet v. Parker*, 3 Sandford, 662. In *Hawley v. Bennett*, 4 Paige, 164, it was said that so far as the rights of the party have been affected by the breach of the in-

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junction, it is no defence to the person who has been guilty of violating, that he did so under the advice of counsel, although, if he has acted in good faith, it may be sufficient to protect him from punishment, as for a criminal contempt. The rights of parties must be protected against the wrongful acts of the adverse party, although he may have acted under the advice of counsel. But where a party acted under the mistaken advice of counsel, that an injunction was superseded by an appeal taken therefrom, the fine imposed should not exceed the actual damages sustained by the adverse party. *Power v. Village of Athens*, 19 Hun, 165. Yet while the fact that a person acted under the erroneous advice of counsel may palliate the offence so as to protect him from further punishment, it will not protect him from a fine sufficient to compensate the adverse party. *Lausing v. Easton*, 7 Paige, 364 ; *Billings v. Carver*, 54 Barb. 40.

An order putting a party in contempt was modified upon its appearing that he acted under the advice of counsel. *In People ex rel. Del Mar v. St. Louis Ry. Co.*, 19 Abb. N. C. 1, a like rule was held, the respondents having acted from a mistaken knowledge of duty and other legal advice, and having subsequently fully complied with the order. A mere statement by the officers of a corporation that they are not now possessed of the books, which they were ordered to produce upon an examination before trial, will not exonerate them from obedience to the order, where it appears that the books were lately in their control. *Fenlon v. Dempsey*, 21 Abb. N. C. 291. In proceedings to punish for contempt in refusing to obey a judgment that required defendant, as president of a company, to do certain acts, it was held no excuse for his non-compliance that the co-operation of other officers was necessary. *King v. Post*, 12 St. Rep. 575. Under § 2284 a witness may be punished by the imposition of a fine within the limit prescribed by that statute, for failure to attend as a witness in obedience to a subpoena, although no actual loss or injury has been occasioned to the party in whose behalf the subpoena was served. *People ex rel. Duffus v. Brown*, 46 Hun, 320. A person against whom two proceedings for contempt have been executed cannot be said to be twice punished for the same offence, where the performance of the act required will relieve him from imprisonment in both proceedings and the imposition of an excessive fine will not entitle him to relief from imprison-

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ment on *habeas corpus*. *People ex rel. Post v. Grant*, 13 Civ. Pro. 305. In case of the plaintiff procuring an order of arrest by imposing an undertaking with worthless sureties upon the court, it was held that the plaintiff or attorney and sureties should be fined in the amount of the judgment recovered upon the undertaking, and in default thereof, imprisonment for a period of three months. *Folcy v. Stone*, 15 Civ. Pro. 224. A proceeding to punish for contempt is a special proceeding, original in its character, and is independent of the proceeding in which the contempt arose. *Gibbs v. Prindle*, 11 App. Div. 470, citing *Erie Railway Company v. Ramsey*, 45 N. Y. 637; *People ex rel. Grant v. Warner*, 51 Hun, 53. It is the disobedience of the order of the court, and not the failure to recognize the instrument by which it is enforced, that constitutes a contempt. *People ex rel. Platt v. Rice*, 80 Hun, 437, 62 St. Rep. 289, 30 Supp. 457, affirmed, 144 N. Y. 249. A committee of a board of supervisors has power to subpœna a witness, but neither the Supreme Court nor a judge thereof can punish as for a contempt, disobedience of the command. Where a person fails to obey such subpœna any judge of the court may issue a warrant commanding the sheriff to apprehend the defaulting witness and bring him before the committee. But where the official term of all the supervisors composing the committee has expired before the issuing of the warrant, committee has no power to act further and the judge has no power to issue the warrant. *Matter of Superintendent of the Poor of Westchester Co.*, 6 App. Div. 144. Proceedings to punish a witness for refusing to testify before a committee of the board of supervisors must be instituted and carried on before a judge and not before a Special Term of the court. The provisions of § 2266 apply only to a civil action or special proceeding pending in court, and have no application in the case of a witness subpœnaed to appear before a committee of the board of supervisors. *People ex rel. Stitz v. Rice*, 57 Hun, 62, 10 Supp. 272.

The incumbent of the office of warden of the city prison of New York was removed by the commissioner of correction, who appointed a successor, who exercised the duties of the office until the court upon *certiorari* made a final order adjudging that the removal was wrongful, and directing the commissioner to restore the person removed to his office. The commissioner

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made an order stating that two wardens were necessary and continued his new appointee to serve as warden during the day and designated the reinstated warden to serve only at night. *Held*, that the commissioner's decision that a second warden was necessary was a shallow pretext for disobeying the order of the court, and that he was guilty of contempt. *People ex rel. Fallon v. Wright*, 22 App. Div. 165, 47 Supp. 894, 81 St. Rep. 894. Where the return to a writ of *habeas corpus*, procured by a husband for the purpose of obtaining from his wife the custody of their infant child, alleges that the child is living in New Jersey and is not a resident of New York, and no traverse is interposed to such allegation, the mother of the child cannot be adjudged guilty of contempt for a failure to produce the child as demanded in the writ. *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 Supp. 814, 86 St. Rep. 814. A surety who, by false justification, secures the release of a mechanic's lien is guilty of a contempt of court, and lapse of time is not a defence. *Matter of Hay Foundry and Iron Works*, 22 App. Div. 87, 47 Supp. 802, 81 St. Rep. 802. After the entry of judgment in a judgment creditor's action adjudging that a transfer by the judgment debtor of his business, consisting of books of account and merchandise, to his sister, was fraudulent and void as to his creditors, and requiring him and his sister to account for the property so transferred, the judgment debtor attended before the referee designated in the judgment, and swore that the books of the business as carried on by his sister were in the possession of third persons to whom she had sold. *Held*, that the judgment debtor could not be committed for contempt because of an alleged failure to account, as he had rendered as full an account as he possibly could. *Diffany v. Risley*, 23 App. Div. 371, 48 Supp. 283, 82 St. Rep. 283. A resale without leave of court by a vendor of goods which a receiver has refused to receive under a contract is not a contempt of the injunction order. *Moore v. Potter*, 155 N. Y. 481, 50 N. E. Rep. 271. Where the commissioner of bridges of New York City violates, under advice of counsel, an injunction order prohibiting him from interfering with or obstructing plaintiff in laying down his pneumatic tubes over the bridge, he is liable to punishment as for a contempt, but where the act was done in good faith and with no wilful intent to violate the order, the commissioner and his adviser should not be punished by way of fine for their act. *New York*

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Mail and Transportation Co. v. Shea, 30 App. Div. 374, 52 Supp. 5, 86 St. Rep. 5. In general, if a party stipulates in open court to pay the expenses of a reference, and he is ordered to pay and refuses, giving no satisfactory reason, he may be punished for contempt. *Fischer v. Raab*, 56 How. 218, affirmed, 58 id. 221; *People v. Rcilly*, 56 id. 223. Bringing an action in the name of another person, without his privity or consent, is a contempt. *Butterworth v. Stagg*, 2 Johns. Cas. 291.

An attorney employed in that capacity who collects or receives money for his client and refuses to pay it after demand made over, is punishable as for a contempt. *Matter of Bleakly*, 5 Paige, 311; *Matter of Dakin*, 4 Hill, 42; *Wilmerdings v. Fowler*, 14 Abb. (N. S.) 249; *People v. Smith*, 3 Cai. 221; *People v. Wilson*, 5 Johns. 368; *Bohanan v. Peterson*, 9 Wend. 503; *Ex parte Ferguson*, 6 Cow. 596; *Matter of Steinert*, 24 Hun, 246; *Ex parte Staats*, 4 Cow. 76. An attorney is also liable for contempt for appearing for a defendant and confessing judgment without authority. *Denton v. Noyes*, 6 Johns. 296. But a client will not be punished for an act done by his attorney without his privity, procurement, or consent. *Satterlee v. DeComeau*, 7 Robt. 666. A receiver who refuses to pay out funds in his hands, pursuant to an order of the court, is punishable as for a contempt. *Clark v. Bininger*, 43 N. Y. Super. 126, 344, affirmed, 75 N. Y. 344. A sheriff is liable to attachment for not returning process. *People v. Brown*, 6 Cow. 41. Or for an insufficient return, with intent to favor defendant. *Burk v. Campbell*, 15 Johns. 456. A witness is liable for contempt for refusing to attend court, and it need not appear that such conduct was calculated to, or did, impair the rights or remedies of the parties complaining thereof. *Bleecker v. Carroll*, 2 Abb. 82; *Woods v. DeFiganierc*, 1 Robt. 607. In proceedings to examine a witness before trial, it must appear, to put him in contempt, that the order prescribed by § 873 has been served on him. *Loop v. Gould*, 17 Hun, 585; *Tobo v. Baker*, 16 id. 182. The court is to decide as to whether a question put to a witness is proper, and that question cannot be inquired into, to impeach a commitment for contempt. *People v. Cassells*, 5 Hill, 164; *People v. Sheriff*, 7 Abb. 96; *Forbes v. Mecker*, 3 Edw. 452. As to the power of a legislative body to commit for contempt, see *The People ex rel. McDonald v. Keeler*, 99 N. Y. 465, which is an exhaustive review

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of the authorities, and the latest expression of the court of last resort on this question.

A witness is not guilty of a contempt in refusing to testify to a fact which would subject him to a penalty or forfeiture. *Henry v. Salina Bank*, 1 N. Y. 83. Nor is a county treasurer bound to answer an interrogatory put to him by a committee appointed by a board of supervisors concerning moneys in his hands as such treasurer. *In re Dickinson*, 56 How. 260. A witness is not bound to answer a question tending to disgrace or criminate himself. *In re Lewis*, 39 How. 155 ; *Lohman v. People*, 1 N. Y. 379 ; *People v. Rector*, 19 Wend. 569 ; *People v. Herrick*, 13 Johns. 82. The privilege is, however, personal to the witness. *Brandon v. People*, 42 N. Y. 265 ; *Southlard v. Rexford*, 6 Cow. 254 ; *Ward v. People*, 6 Hill, 144. By statute, communications between attorney and client, between physician and patient, and between clergyman and layman, are confidential ; also between husband and wife.

SUB. 2. HOW JUDGMENT ENFORCED BY CONTEMPT PROCEEDINGS. § 1241.

§ 1241. When a judgment may be enforced by punishment for disobeying it.

In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it ; and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court :

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.
2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section ; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.
3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing, an act, except in a case specified in the next subdivision.
4. Where the judgment requires the payment of money into court, or to an officer of the court ; except where the money is due upon a contract, express or implied, or as damages for non-performance of a contract. In a case specified in this subdivision, if the judgment is final, it may be enforced, as prescribed in this section, either simultaneously with, or before or after the issuing of an execution thereupon, as the court directs.

The provisions of § 1241 are not imperative ; the judgment creditor has no claim *de jure* that the power should be exercised ; its exercise is discretionary with the court below. *Cochrane's Executor v. Ingersoll*, 73 N. Y. 613. The cases where disobedience to a judgment may be punished as a contempt are, where it can-

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not be enforced by execution, or where it directs the payment of money into court, or to an officer of the court. *O'Gara v. Kearney*, 77 N. Y. 423. A surety on an administrator's bond, who, after an unsatisfied decree against him, and a judgment on the bond, has paid the amount, has a right to an attachment against the administrators ; the judgment on the bond did not take away any remedy on the principal debt, and attachment and execution may be used concurrently. This decision under *R. S. Townsend v. Whitney*, 75 N. Y. 425. Where a judgment adjudges the payment of a sum to a creditor from the surplus income of a trust estate, the trustee is, after demand, personally liable, and precept may be issued to collect the amount on motion, on its being shown that he has paid the amount over on another judgment. *Williams v. Thorn*, 81 N. Y. 381. When a judgment requires a party to execute a conveyance, and an instrument in proper form is tendered him, he is bound to execute it, though it has not been submitted to the court for approval, and it need not be tendered simultaneously with service of a copy of the judgment. *Hilliker v. Hathorne*, 5 Bosw. 710 ; *Morris v. Walsh*, 9 id. 636.

The method of proceeding to punish for contempt on refusal by a party to carry out the requirements of a judgment was considered in *Pitt v. Davidson*, 37 N. Y. 235, 3 Abb. N. C. 398, 34 How. 455. The cases where disobedience of a judgment may be punished for contempt are where it cannot be enforced by execution or where it directs the payment of money into court or to an officer of the court. *O'Gara v. Kearney*, 77 N. Y. 423. A judgment directing defendant to pay plaintiff money received by defendant for property sold in violation of an injunction cannot be enforced by contempt proceedings under § 1241, such judgment being enforceable by execution. *Tabor v. Jaccke*, 12 Supp. 645, 45 St. Rep. 832. A judgment rendered in an action compelling a trustee of a corporation to account for property of the corporation wrongfully appropriated by him, and directing him to pay over the value thereof in money to the receiver, may be enforced by contempt proceedings even though execution could have been issued thereon. *Gildersleeve v. Lester*, 68 Hun, 535, affirmed, 139 N. Y. 608, 52 St. Rep. 559, 22 Supp. 1028. When the sole liability which is sought to be enforced by judgment is that of a partner to his co-partners, and such liability arises out

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of a contractual relation existing between them, a fiduciary relation is not established such as will authorize the punishment of defendant for contempt under § 1241. *Walford v. Harris*, 78 Hun, 348, distinguishing *Gildersleeve v. Lester*, 68 Hun, 535. In order to enforce a judgment under § 1241 the defendant should be served personally with a copy of the judgment. Service of defendant's attorney with personal demand upon defendant is insufficient. *Fero v. Van Evers*, 9 How. 148. But where the judgment requires a party to execute an assignment or conveyance, and an instrument in proper form is tendered to him, he is bound to execute it, although he is not bound to submit to the court or judge for approval. *Helliken v. Hathorne*, 5 Bosw. 710. And a deed need not necessarily be tendered for execution simultaneously with the service of a copy of the judgment. It may be tendered at any time if such service is sufficient. *Morris v. Walsh*, 9 Bosw. 636, 14 Abb. 388.

Section 1241 is not imperative, but discretionary. *Nolan v. Nolan*, 29 Hun, 630. The court cannot punish as for contempt a husband in not paying the costs and counsel fees which he was directed to pay in final judgment in an action for separation, since they may be collected by execution. *Jacquin v. Jacquin*, 36 Hun, 378. An attachment for disobedience of an injunction will not be granted where the defendant has appealed and given security for stay of proceedings on judgment. *Howe v. Scaring*, 11 Abb. 28. Where a judgment adjudges the payment of a sum to a creditor from the surplus income of the trust estate, after demand the trustee is personally liable and a precept may issue to collect the amount from him. *Williams v. Thorne*, 81 N. Y. 281. Subdivision 4 of § 1241 provides that a person disobeying a judgment of the court which required the payment of money into court, or to an officer of the court, except where it is due upon a contract express or implied, or for damages for non-performance of the contract, may be punished for contempt, and where an order was made by which the relator was directed to pay over a sum of money to a receiver, a demand having been made, and the relator having failed to make the payment, a warrant of attachment was properly issued. *People ex rel. Pond v. Hampton*, 15 Misc. 364. The cases in which a party failing to comply with the terms of a judgment may be punished for contempt are considered, and authorities cited in *Kittel v. Stutec*, 11

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Misc. 279. The surety on an administrator's bond, who, after an unsatisfied decree or judgment on the bond, has paid the amount, has a right to an attachment against the administrator. The judgment on the bond did not take away any remedy on the principal debt, and attachment and execution may issue concurrently. *Townsend v. Whitney*, 75 N. Y. 425.

The method of procedure for the enforcement of a judgment for alimony in matrimonial actions under § 1773 of the Code is fully stated in Fiero on Special Actions, pages 975 to 988, where the authorities and precedents are given for procedure in such cases. It is therefore unnecessary to go into this matter in detail, and no attempt will be made to discuss the question except by way of citation of a single authority. In *Delanoy v. Delanoy*, 19 App. Div. 295, it is held, reiterating the rule so frequently laid down by the courts, that a husband cannot excuse his failure to pay alimony by setting up as answer to a motion to punish him for contempt his present poverty or inability to pay. It is further held that the procedure on such a motion is to be taken under §§ 2266 and 2268 of the Code, and judgment is to be enforced under § 1773, but that the necessary prerequisite is service upon the husband of a certified copy of the judgment and demand for payment.

SUB. 3. CONTEMPTS IN SUPPLEMENTARY PROCEEDINGS. § 2457.

§ 2457. Disobedience to order; how punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceeding; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him; may be punished by the judge or by the court out of which the execution was issued, as for a contempt.

Co. Proc. § 302.

The authorities under this section are cited and the practice given under Supplementary Proceedings.

SUB. 4. CONTEMPT PROCEEDINGS TO ENFORCE SURROGATE'S DECREE. § 2555.

§ 2555. Enforcement of decree; by punishment for contempt.

In either of the following cases, a decree of a surrogate's court, directing the payment of money, or requiring the performance of any other act, may be enforced, by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court.

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1. Where it cannot be enforced by execution, as prescribed in the last section.
2. Where part of it cannot be so enforced by execution ; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.
3. Where an execution, issued as prescribed in the last section, to the sheriff of the surrogate's county, has been returned by him wholly or partly unsatisfied.
4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties in his official bond.

L. 1867, ch. 782, § 15 ; see § 1241.

The provisions of § 2555 do not apply to the enforcement of a decree rendered prior to September 1, 1880. *Underhill v. Nichols*, 4 Redf. 318 ; *Woodhouse v. Woodhouse*, 5 id. 131 ; *Joel v. Ritterman*, id. 136. Where an executor was indebted to his testator, and after assuming charge of the estate became insolvent, having accounted, however, for all moneys of the estate received by him, it was held he was not amenable to contempt proceedings for failure to pay the debt. The provisions of the Code were passed to permit the punishment, by contempt proceedings, of trustees who had embezzled the funds of *cestuis que trust*, and do not change the character of a contract debt due from the executor. *In re Rugg*, 3 State Rep. 224, citing *Baucus v. Stover*, 89 N. Y. 1. It is said by Livingston, surrogate, in *Ferguson v. Cummings*, 1 Dem. 433, that the powers conferred by § 2555 should be exercised in conformity with the liberal spirit of State legislation on the subject of imprisonment for debt. The holding in *Re Dissoway*, 91 N. Y. 235, that contempt proceedings cannot be taken to enforce a decree for payment of money until an execution has been returned unsatisfied, wholly or in part, relates to proceedings defined by the first three subdivisions of the section, and the provisions of § 4 do not require an execution against an executor, etc., but it is held, in *Estate of Killinger*, 2 McCarty's Civ. Pro. 68, that it is discretionary with the surrogate in such case whether to require the issue and return of an execution ; and *Ferguson v. Cummings*, 1 Dem. 433, holds that the issuing of an execution ought not, in the exercise of a sound discretion, to be dispensed with. An administrator ordered to pay costs cannot excuse non-payment by showing he has no assets, *non constat*, but that he

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has squandered them. *Gillies v. Kreuder*, 1 Dem. 349. As to insufficiency of assets, the surrogate exercises a discretion in deciding the fact on conflicting evidence. *Matter of Snyder*, 2 State Rep. 758. In *Matter of Kurtzman*, 2 id. 655, it is said that whatever doubt there may have been before the Code, as to the right of a surrogate to punish an administrator for contempt, for non-payment of moneys, there can no longer be any doubt as to such power and its extent. The claim of an executor that he has no funds is too general, and is unavailing. Citing *Matter of Snyder*, 34 Hun, 302; *Matter of Steinert*, 29 id. 301. The liability of an executor who was indebted to his testator is not the same as if he had received assets of the estate, and if unable to pay, he cannot be punished for contempt. *Baucus v. Stover*, 89 N. Y. 1. The decisions under the Revised Statutes as to power of surrogate to punish for non-payment of moneys were very conflicting. See *Watson v. Nelson*, 69 N. Y. 536; *People v. Cowles*, 4 Keyes, 46; *Scaman v. Duryea*, 11 N. Y. 324; *Townsend v. Whitney*, 75 id. 425.

In *People v. Marshall*, 7 Abb. N. C. 380, will be found a discussion and history of the power of courts of probate and chancery to imprison for contempt for non-payment of decrees. In *Estate of Sherry*, 7 Abb. N. C. 390, it is said that an attachment against an executor or administrator for non-payment of money as required by a surrogate's decree cannot be issued unless it be shown that he had funds in his hands at the time of the decree. Citing *Watson v. Nelson*, 69 N. Y. 536. The same rule is laid down in *Stockbridge's Assignment*, 7 Abb. N. C. 395, relative to assignment for the benefit of creditors. *Slawson v. Schlessinger*, 7 Abb. N. C. 399, holds that payment of costs awarded against an infant may be enforced by attachment against guardian *ad litem* as a matter of course and of legal right. In *Matter of Watson*, it is held that a surrogate's power to enforce a decree did not authorize him to inflict a fine and then commit upon the fine. Appeal dismissed in 69 N. Y. 536, after a full discussion of the subject in the opinion. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce performance of it by attachment. *Dunford v. Weaver*, 84 N. Y. 445. In order to punish a person for contempt for non-payment of money ordered by the court to be paid, the personal demand required by the Code, § 2555, must be shown by affidavit. It

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must be a demand by or on behalf of the party to whom the order required the payment to be made. *Matter of Gilman*, 15 St. Rep. 718. An attachment cannot be based upon disobedience of an order without proof of personal service. *Matter of Barnes*, 1 Civ. Pro. 59. An executor who is indebted to the estate of the testator and who is unable to pay the amount which it has been adjudged he is indebted will not be adjudged in contempt where he is not able to pay it. *Matter of Ockershausen*, 59 Hun, 200. A direction that an executor pay an allowance to a guardian *ad litem* is one which can be enforced by contempt proceeding. *Beckett v. Place*, 12 Misc. 323. Personal property specifically bequeathed to an executor is subject to application upon the debts of the testator's estate where there is a deficiency of assets ; and for a failure to account therefor upon an order of the court he is guilty of contempt of court and is properly fined the appraised value of the property covered by his specific legacy. When this fine is paid by the executor he will, under § 2284, be entitled to credit for the amount. *Matter of Pye*, 18 App. Div. 306, affirmed 154 N. Y. 773. The Code confers upon the surrogate power to enforce proceedings for contempt for disobedience to a decree directing payment of costs. *Matter of Humfreville*, 19 App. Div. 381, reversed in 154 N. Y. 115, which holds that § 2555, authorizing the enforcement of certain decrees of surrogates' courts by proceedings for contempt, does not apply to proceedings or decrees for the payment of costs only, and such decree of the surrogate is subject to the general provision of § 15, prohibiting imprisonment for non-payment of costs except in actions specified therein. When the only payment of money directed to be made by the decree of the surrogate's court removing an executor are costs, it cannot be enforced by imprisonment. All concurring except Gray, J., who holds that the court is committed to an opposite view in *Matter of Dissosway*, 91 N. Y. 235. The granting of an order under § 2555 is in the discretion of the surrogate, but this discretion should not be exercised in favor of a delinquent executor who has been directed to make payment from the money in his hands and who has disobeyed such direction, unless under extraordinary circumstances. The state of facts which, pending one's imprisonment in contempt proceedings, would justify his discharge, would equally justify a denial of the application for his commitment.

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Matter of Battle, 10 St. Rep. 667. A surrogate may make an order directing executor to pay money in his hands after a decree entered upon accounting, and may, if he neglects to comply with the order, and if it does not appear that execution has been issued, arrest the executor on attachment. The executor, on the return of the attachment, may show cause against his commitment. *Saltus v. Saltus*, 2 Lans. 9.

ARTICLE III.

WHEN PUNISHED SUMMARILY. §§ 2267, 2268.

§ 2267. When punishment may be summary.

Where the offence is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge, or referee, stating the facts which constitute the offence, and bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor.

2 R. S. 535, § 2 (2 Edm. 554); see § 1018.

§ 2268. When warrant to commit may issue without notice.

Where the offence consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

2 R. S. 535, § 4, am'd by L. 1847, ch. 390, § 2 (4 Edm. 630).

A plain line of distinction is drawn between proceedings for a contempt occurring in the presence of a judge, and the facts constituting which are certified by him, and cases of professional misconduct out of the presence of the court, where the actual truth is a matter of evidence. In the former class of cases it is held that the facts embodied in the order of the judge must be taken as true. In the latter the right of review is asserted, not only where there had been want of jurisdiction, but where the court below had decided erroneously on the testimony. Its discretion is not unlimited, and while not to be overruled in cases of doubt, is yet subject to review. *Matter of Eldridge*, 82 N. Y. 161. As to what constitutes a criminal contempt, see *People v. Oyer and Terminer*, 101 N. Y. 245. An order made by the court is a sufficient commitment where the contempt has been committed in the presence of the court, and it appears it should direct the

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sheriff to take him into custody and confine him, and interrogatories do not seem to be necessary. *Matter of Percy*, 2 Daly, 530. Where a witness summoned before the grand jury declined to answer, and after the court had ruled the question proper he repeated his refusal, it was held to be a contempt in the immediate view and presence of the court, so that no affidavit or further evidence was needed for commitment. *Matter of Hackley*, 24 N. Y. 74. In the latter case no interrogatories were propounded, and the following precedent was held sufficient. It will be noted it was a case of criminal contempt. The provisions of § 2267 seem applicable to an criminal contempt only, despite the statement of the revisers that no attempt is made to provide for the punishment of such contempts, since this is practically the only class of contempts committed in view of the court.

Before an attachment can issue for non-compliance with a judgment or order, it must be distinctly settled by the court or referee what the party can properly be required to do. *Sutton v. Davis*, 6 Hun, 237, appeal dismissed, 64 N. Y. 633; *People v. Alexander*, 3 Hun, 211. A precept under this section may be issued *ex parte*, and without reference to the ability of the party to pay the money, and whether his disobedience was wilful or not. *People v. Coules*, 4 Keyes, 38; *In re Kelly*, 62 N. Y. 198; *Clark v. Biningger*, 75 id. 344. A demand is necessary before contempt proceedings can be taken under this section by the person entitled to the moneys, or some person authorized by him, and it is properly made of the person sought to be punished. If this is not done proceedings will be set aside. *Fischer v. Raab*, 58 How. 221. Where a receiver wilfully refused to obey an order of the court directing him to pay over moneys in his hands as such, it is the proper practice to grant an order to show cause, and give the receiver an opportunity to be heard; and there must be an adjudication that he is guilty of misconduct before he can be punished. So held under Revised Statutes. *Clark v. Biningger*, 75 N. Y. 344. See § 2269 for form of affidavit.

To punish a person for contempt under § 2268 for non-payment of money ordered to be paid by the court, "the personal demand" required by the section, to be proved by affidavit, must be a demand by or on behalf of the party to whom the order requires payment to be made. *Matter of Gilman*, 15 St. Rep. 718. In any case before a person can be punished for a

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contempt in disobeying an order, he must have had notice of it and an opportunity to become acquainted with its provisions, and a demand must have been made upon him to do the thing which the order required of him; therefore, an order appointing a receiver of the property of a judgment debtor which contains no requirement that the debtor deliver his property to the receiver, and no demand for its delivery has been made, the court has no power subsequently to grant an order, on the instance of the receiver requiring the judgment debtor, forthwith to turn over to the receiver certain property, or in the alternative that the debtor show cause why he should not be punished for a contempt; nor can the court, upon the return day of such order, adjudge the debtor to be in contempt. *Bradbury v. Bliss*, 23 App. Div. 607.

Precedent for Warrant to Commit for Non-Payment of Money.

The People of the State of New York to the Sheriff of the County of Albany, greeting :

WHEREAS, By affidavit of John Cromwell, it appears that on the 5th day of May, 1887, an order was granted in the Supreme Court commanding Marinda Wheeler to appear and answer concerning her property in an action in which John Cromwell was plaintiff and said Marinda Wheeler defendant, in which an execution had issued to the sheriff of Albany County, where said Marinda Wheeler then resided, on a judgment obtained against her in the Supreme Court in said county for the sum of \$2,150 in said action, which judgment had been duly docketed; and

WHEREAS, The said Marinda Wheeler appeared before Charles J. Buchanan, Esq., a referee appointed for that purpose, and answered concerning her property; and

WHEREAS, It appeared that she had in her hands the sum of \$850, applicable to the payment of said judgment, and an order was duly made on the 1st day of June, 1887, commanding and directing her, the said Marinda Wheeler, to pay over said sum to said plaintiff on said judgment, or that in default thereof an attachment issue; and

WHEREAS, The said order was duly served on said Marinda Wheeler on the 3d day of June, 1887, and the said moneys demanded by the plaintiff, as appears by due proof thereof, and the said Marinda Wheeler neglected and refused, and still neglects and refuses, to pay over said moneys or any part thereof: Now, therefore, we command you to arrest the said Marinda Wheeler, if she shall be found in your bailiwick, and commit her to the county jail of Albany County, until the said sum of \$850 is paid. You are to make return under your hand of the manner in which you have executed this writ, and have you then and there this writ.

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Witness, Hon. A. B. Parker, Justice of the Supreme Court, Albany, June 5, 1887. ROBERT H. MOORE,
E. D. RONAN, Clerk.
Attorney for Plaintiff.

Indorsed :—"Let the within writ of attachment issue.

"A. B. PARKER,
"Justice Supreme Court."

The warrant should be accompanied by a formal order as follows :

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, on the 5th day of June, 1887 :

Present :—Hon. A. B. Parker, *Justice.*

The People *ex rel.* John Cromwell,

agst.

Marinda Wheeler.

It appearing by the report of Charles J. Buchanan, Esq., the referee in supplementary proceedings in this action, and the affidavit of John Cromwell, plaintiff, that the defendant has in her possession, applicable to the payment of the judgment herein, the sum of \$850, which she refuses to apply thereon, although ordered so to do, and proof of service of such order and demand of payment having been made and filed :

Now on motion of E. D. Ronan, attorney for plaintiff, it is ordered, that a warrant issue against said Marinda Wheeler, as for a contempt, under and by virtue of § 2268 of the Code of Civil Procedure to commit her to prison till said sum is paid.

Enter in Albany County.

A. B. PARKER,
Justice Supreme Court.

ARTICLE IV.

MANNER OF COMMENCING THE PROCEEDING.

§§ 2269–2279, inclusive.

SUB. 1. BY WHOM PROCESS ISSUED. §§ 2271, 2272.

2. ORDER TO SHOW CAUSE AND PROCEEDINGS THEREON. §§ 2269, sub. 1, 2270, 2273.

3. WARRANT WHEN ISSUED AND PROCEEDINGS THEREON. §§ 2269, sub. 2, 2278, 2274, 2275, 2276, 2277, 2279.

SUB. 1. BY WHOM PROCESS ISSUED. §§ 2271, 2272.

§ 2271. Order or warrant ; when granted out of court.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in the last section but one, by any judge authorized to grant an order without notice, in an action pending in the court ; and it must be made returnable at a term of the court, at which a contested motion may be heard.

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§ 2272. Id.; when contempt was committed before a referee.

An order to show cause may be made, or a warrant may be issued, as prescribed in § 2269 of this act, by a referee appointed by the court, where the offence is committed upon the trial of an issue referred to him, or consists of a witness's non-attendance, or refusal to be sworn or to testify, before him. The order or warrant may, in the discretion of the referee, be made returnable before him, or before the court. Where it is made returnable before the referee, he has all the power and authority of the court, with respect to the motion of special proceeding, instituted thereby.

See § 1018.

It was held previous to the enactment of this section, in *Lathrop v. Clapp*, 40 N. Y. 328, that upon an examination under supplementary proceedings after judgment, where it appears that the judgment debtor has transferred property to a witness, that the latter was bound to answer all questions touching the transfer, and upon his refusal to answer, he was liable to be punished for a contempt. The proceedings were under § 302 of the Code of Procedure, and the order to punish the witness for contempt might be made by a judge out of court, where the proceeding was pending before a referee, and need not state that the proceeding had impeded, impaired, prejudiced, or defeated the plaintiff's remedy. In *Naylor v. Naylor*, 32 Hun, 228, it is held that the referee may make an order to show cause, returnable before the court, and that the court may then take cognizance of the matter, and has power to proceed in the premises.

A referee appointed to hear and report evidence may punish for a contempt. *People ex rel. v. Miller*, 7 Misc. 7, 59 St. Rep. 202, 29 Supp. 305.

A notary public appointed by a foreign court a commissioner to take testimony here, for use in the foreign court, has no power to commit a witness for contempt in refusing to answer pertinent questions, but such power can only be exercised by a court. *People ex rel. McDonald v. Leubischer*, 23 Misc. 495, 51 Supp. 735, 85 St. Rep. 735, 27 Civ. Pro. 296. Sections 854 and 855 of the Code do not apply to the case of a recalcitrant witness before a commissioner appointed to take testimony to be used in an action in another State, as that is provided for by § 920. The justice who issued a subpœna requiring a witness to appear before a commissioner appointed by a foreign court to take testimony in this State has no power to hear or determine an application to punish a witness for refusing to answer questions upon his examination, but such power is confined to the officer

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before whom he was required to appear. *Matter of Scarls*, 155 N. Y. 133, 49 N. E. Rep. 938, 27 Civ. Pro. 192, reversing 22 App. Div. 140, 48 Supp. 60, 82 St. Rep. 60.

SUB. 2. ORDER TO SHOW CAUSE AND PROCEEDINGS THEREON. §§ 2269, sub. 1, 2270, 2273.

§ 2269. Order to show cause, or warrant to attach offender.

The court or judge, authorized to punish for the offence, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offence, either

Make an order requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offence, or * * * *

§ 2270. Notice to delinquent officer to show cause.

Where it is prescribed by law, or by the general rules of practice, that a notice may be served in behalf of a party, upon a sheriff or other person, requiring him to return a mandate, delivered to him, or to show cause, at a term of a court, why he should not be punished, or why an attachment should not be issued against him, for a contempt of the court; the party, in whose behalf the notice is served, may, at the time specified therein, file with the clerk, proof, by affidavit or other written evidence, of the delivery of the mandate to the accused; of the default or other act, upon the occurrence of which, he was entitled to serve the notice; of the service of the notice; and of the failure to comply therewith. Thereupon the proceedings are the same, as where an order to show cause is made, and it, and a copy of the affidavits upon which it is granted, are served upon the accused.

§ 2273. Effect of order to show cause, and of warrant.

An order to show cause may be made, either before or after the final judgment in the action, or the final order in the special proceeding. It is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein. A warrant of attachment is a mandate, whereby an original special proceeding is instituted against the accused, in behalf of the people, upon the relation of the complainant.

Before one can be punished for a contempt, the statute requires either an order to show cause why such punishment should not be inflicted, or that a warrant of attachment should issue to bring him before the court, and whichever mode of procedure is adopted, it is necessary that certain facts should be made to appear to the court. These facts are specified under § 2269, and one of them is that the judge must be satisfied by affidavit of the offence, until that has been done, no order to show cause can be issued. No offence can be committed until the order directing the act to be done has been brought to the attention of the defendant, and demand has been made upon him that it shall be done, and he is not guilty of contempt of court until

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after that demand has been refused or neglected. *Bradbury v. Bliss*, 23 App. Div. 607. An order to show cause why a party should not be punished for a contempt of court cannot be made until the contempt has been committed. *Bradbury v. Bliss*, 23 App. Div. 606, 48 Supp. 912, 82 St. Rep. 912.

The order to show cause operates as a notice of motion made in the action, and the papers must be entitled in the action or proceeding. The warrant in the first instance institutes a new special proceeding, which may be entitled "The People ex rel. Theophelia G. Townsend, agst. Oliver B. Whitney." Where the order was made requiring the defendant to appear at a certain time and place specified, to show cause why he should not be *attached* for a contempt, on the return of which an order was made adjudging him guilty of a contempt, and directing his punishment therefor, and it did not appear that he was misled or failed to appear in consequence of the use of the term *attached* in place of *punished*, it was held that as the use of the term did not appear to have prejudiced the defendant, the order should be affirmed. *People v. Kenny*, 2 Hun, 346.

There must be an affidavit in civil cases; the statute is express. *Ackroyd v. Ackroyd*, 3 Daly 38. The party is brought into court by attachment either absolute or *nisi*. *Jackson v. Smith*, 5 Johns. 117; *Matter of Smethurst*, 2 Sandf. 724; *Matter of Vanderbilt*, 4 Johns. Ch. 57. The proceeding may be by attachment for contempt, or order to show cause why the party should not be punished for contempt. In either case it must be shown that the party is in contempt, and where the proceeding is by order to show cause the papers on which the application is founded, or so much of them as are not already in possession of the accused, must be served on him or his solicitor, such length of time before the hearing, as the order directs. The service of a mere notice of motion is not sufficient; the party must be brought into court by the service of an order to show cause or an attachment. *Sandford v. Sandford*, 40 Hun, 540. Either an attachment must issue or an order be granted to show cause why the party should not be punished for misconduct, otherwise the proceedings are invalid. *Fall Brook Co. v. Heckscher*, 6 State Rep. 676. If a party fails to appear, or shows no sufficient cause, the court may make a final order of punishment for contempt. If the contempt is denied the court may discharge the order to show cause or

 Art. 4. Manner of Commencing the Proceeding.

require interrogatories on the coming in of which the court acts. So where the procedure is by attachment, there must be interrogatories, unless the accused admit the contempt as charged. *Albany City Bank v. Schemerhorn*, 9 Paige, 372. It was held, in *Dunford v. Weaver*, 84 N. Y. 445, that the process need not recite all the facts and proceedings necessary to confer jurisdiction, and in *Park v. Park*, 80 N. Y. 156, it was held that where there was an indorsement on the process signed by the clerk, showing it was issued by special order of the court, it would be presumed an order had been entered, but in any event, as the objection was not raised below, it could not be raised in Court of Appeals. Much conflict is found in the decisions previous to the Code of Civil Procedure, as to whether the proceedings should be entitled, as in the action or proceeding in which the contempt originated, or as a new special proceeding. This question is definitely settled by § 2273, which provides that a warrant of attachment is a mandate whereby an original special proceeding is instituted against the accused in behalf of the people, upon the relation of the complainant. In following the precedents hereafter in entitling papers, this distinction must be carefully borne in mind, and the title must be adapted as to the original action or a new proceeding, as it may be commenced by warrant or order, up to the time of the issuing of the warrant. It then becomes a special proceeding, and must be so entitled, however commenced. *Matter of Dissosway*, 91 N. Y. 235. It, however, leaves open the question as to how the order should be entitled which directs the warrant to issue. It would seem proper to entitle the papers up to the warrant in the original suit and proceeding. See *Folger v. Hoogland*, 5 Johns. 235; also *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; and *Sudlow v. Knox*, 7 Abb. (N. S.) 411, Court of Appeals. An order to show cause to punish for a contempt, made by a county judge, returnable after expiration of his term of office, may be heard and decided by his successor in office. *Ganeman v. Berry*, 34 Hun, 138. It is said in *Whitman v. Haines*, 21 St. Rep. 41, by Brady, J., at page 43, that in procedure by order to show cause, the caption of the action is properly preserved, that it is only where the proceeding is by attachment that the contrary is true. Where the defendant fails to object to the examination of witnesses before court, but on the contrary cross-examines them, he must be held to have consented to the practice adopted,

 Art. 4. Manner of Commencing the Proceeding.

and cannot complain thereof on appeal. *King v. Barnes*, 113 N. Y. 476, 23 St. Rep. 263, affirming 51 Hun, 557, 22 St. Rep. 54, 4 Supp. 251. As to power of referee appointed under § 1118 and of the court, respectively, to punish for contempt, see *Nailor v. Nailor*, 32 Hun, 228. Where an order has been made requiring a husband to pay alimony theretofore ordered, and directing that if he fails to do so a commitment issue against him as for contempt, it is not required that there be served with the final order the affidavit or proof recited therein and notice for an application for such order be given. Section 2274, requiring affidavit and proof upon which the order to punish for contempt shall be served, refers to affidavit upon which a warrant of attachment is granted to bring a party before the court to answer for an alleged contempt. Such notice of application may be dispensed with where the contempt consisted of neglect or refusal to pay a specified sum of money as required by an order of the court. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 184.

Affidavit for Order to Show Cause.

SURROGATE'S COURT—COUNTY OF ROCKLAND.

In the Matter of the Application of Isaac E.
Pye *et al.*, creditors, etc.

} 154 N. Y. 773.

CITY AND COUNTY OF NEW YORK, ss. :

Julius Henry Cohen, being duly sworn, says :

I am a clerk in the office of Mannice, Abbot & Perry, Esqs., who are the attorneys for the petitioners, and am over the age of 21 years.

On the 18th day of January, 1897, an amended final order and decree was duly made and entered removing Erastus Van Houten from his position as executor of the last will and testament of Edward G. Van Houten, deceased. I personally served a certified copy of the said amended final order and decree upon the said Erastus Van Houten, whom I knew to be the executor named and described therein. Said service was made on the 18th day of January, 1897, at the stable building at Liberty & Church Streets in the village of Nyack by the delivery to the said Erastus Van Houten personally of said certified copy, of said amended order and decree.

At the time and place of said service I personally demanded that said Van Houten deliver to one John Wood possession of the property and the estate of Edward G. Van Houten, said Wood being, as said Erastus Van Houten was duly informed, the duly authorized representative of Anna L. Van Houten and Della Van Houten, exec-

 Art. 4. Manner of Commencing the Proceeding.

utrices of said Edward G. Van Houten, deceased, and being present with me at the time, and exhibiting his authority in writing, which said Van Houten declined to look at.

I demanded that he make such delivery as aforesaid of all money or property, or the proceeds thereof, which belonged to the estate of said deceased, or which came into his possession as executor, and all property belonging to the estate of the said deceased then in his possession, or under his control, and particularly the business as a whole and all of the goods and chattels contained in the building situate at the place said service was made, to wit, the said stable building where the livery stable business was carried on by Edward G. Van Houten in his lifetime, and all the property belonging to the estate which he had removed from said building; and further demanded that he vacate the building and cease from exercising any control over its contents. In spite of said demand said Erastus Van Houten refuses to deliver to the said authorized representatives all or any part of the property mentioned in the demand, and refuses to vacate said building, and he still persists in such refusal.

I had been in the stable on the 12th day of December, 1896, and at that time there were ten carriages and other property in the stable. At the time I made the aforesaid service and demand, the stable, with the exception of one or two carriages, was empty.

JULIUS HENRY COHEN.

(Acknowledgment).

Order to Show Cause why Defendant should not be Punished for Contempt.

NEW YORK SUPREME COURT—CITY AND COUNTY OF NEW YORK.

Archibald Sheffield *et al.*,

agst.

John T. Mitchell *et al.*

} 21 App. Div. 518.

On reading the annexed affidavits of _____ and _____, and upon the order to show cause herein, dated March 16, 1897, and the summons and complaint and the affidavits upon which said order to show cause was granted, and the affidavits of service thereof upon the defendants, verified March 20, 1897, and March 24, 1897, and the order continuing the injunction herein, dated April 13 1897, all duly filed in this court on the 13th day of April, 1897.

Let the defendants (insert names) show cause at a Special Term of this court to be held at part 1 in the county court-house in the city of New York on the 7th day of June, 1897, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why they and each of them should not be punished as for a contempt for their misconduct in failing to obey the injunction orders of March 16, 1897, and April 13, 1897, entered herein as alleged in the annexed affidavits, and why their answers herein should not be stricken

 Art. 4. Manner of Commencing the Proceeding.

out and a reference directed to take proof *ex parte* of the matters alleged in the complaint, and why the plaintiff should not have such other and further relief as may be just, with the costs of this motion; and due reason appearing therefor let all proceedings herein on the part of the defendants be stayed until the further order of this court.

Let service of a copy of this order on the above named John T. Mitchell and Henry H. Cooper personally on or before the 3d day of June, 1897, be sufficient.

Dated, New York, May 29, 1897.

F. SMYTH,
Justice.

Order to Show Cause.

SURROGATE'S COURT—ROCKLAND COUNTY.

In the Matter of the Application of
Isaac E. Pye, etc.

} 154 N. Y. 773.

Upon the amended final order and decree made and entered in this proceeding on the 18th day of January, 1897, the affidavits of Julius Henry Cohen, verified the 20th day of January, 1897, and of (insert names of all other affiants), and also of John M. Perry, verified the 20th day of January, 1897, showing due proof of service of a copy of said order on Erastus Van Houten, and wherefrom it further appears to the satisfaction of the court that Erastus Van Houten has refused to obey the same, and that the rights of the petitioners may and are defeated, impaired, impeded, and prejudiced by said refusal; and upon the motion of Mannice, Abbot & Perry, Esqs., attorneys for the petitioners, it is

Ordered, that said Erastus Van Houten show cause at a surrogate's court to be held in and for the county of Rockland at the surrogate's office in the Commercial Building in the village of Nyack, on the 28th day of January, 1897, at 3 o'clock in the afternoon, why he should not be punished as for a contempt in refusing to obey the said amended order and decree of this court, made and entered on the 18th day of January, 1897, as aforesaid, removing him as executor and enjoining him from interfering with the assets of the estate of the decedent herein, and directing the delivery thereof as therein provided, and why the petitioners in this proceeding should not have such other and further relief as to the court shall seem just.

Sufficient cause having been shown, service of this order on the 27th day of January, 1897, before four o'clock in the afternoon of that day shall be sufficient.

Dated, Nyack, N. Y., January 27th, 1897.

A. S. TOMPKINS,
Surrogate.

Art. 4. Manner of Commencing the Proceeding.

Precedent for Order to Show Cause.*(Caption.)*

ULSTER SURROGATE'S COURT.

In the Matter of the Estate of John Ferris,
deceased.

On reading and filing the verified petition of Theophelia G. Townsend, showing that by a decree granted in this matter in this court on the 12th day of July, 1886, Oliver B. Whitney, executor of John J. Ferris, deceased, was adjudged to pay over to her the sum of \$1,200, from funds in his hands, that he has failed so to do after service of copy of decree, and demand duly made, and that execution thereon has been returned unsatisfied :

Now, on motion of Walter S. Fredenburgh, attorney for petitioner, it is ordered that said Oliver B. Whitney show cause, at a term of this court, to be held at the surrogate's office, in the county of Ulster, on the 10th day of April, 1887, at 10 o'clock, A. M., why he should not be punished for such alleged offence.

ALVAH S. NEWCOMB,
Clerk of the Surrogate's Court.

SUB. 3. WARRANT WHEN ISSUED AND PROCEEDINGS THEREON. § 2269, sub. 2, §§ 2278, 2274, 2275, 2276, 2277, 2279.

§ 2269. Order to show cause, or warrant to attach offender.

The court or judge, authorized to punish for the offence, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offence, either : * * * *

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offence.

§ 2278. When habeas corpus may issue.

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment cannot be issued. In that case, the court, upon proof of the facts, must issue a writ of *habeas corpus*, directed to the officer, requiring him to bring the accused before it, to answer for the offence charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

See § 2013.

§ 2274. Copy affidavit, etc., to be served with warrant.

A copy of the warrant, and of the affidavit upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof.

2 R. S. 535, § 3.

 Art. 4. Manner of Commencing the Proceeding.

§ 2275. Indorsement upon warrant.

Where a warrant of attachment is issued, the court, judge, or referee, may, in its or his discretion, by an indorsement thereupon fix a sum, in which the accused may give an undertaking for his appearance to answer.

Id. § 10, am'd.

§ 2276. Warrant; how executed.

If an indorsement is not made upon the warrant, as prescribed in the last section; or if such an indorsement is made and an undertaking is not given, as prescribed in the next section; the sheriff after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

Id. §§ 12, 14, and 37.

§ 2277. Undertaking to procure discharge.

Where an indorsement is made upon the warrant, as prescribed in the last section but one, the accused must be discharged from arrest, upon his executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking to the people, in the sum specified in the indorsement, with two sufficient sureties, to the effect that he will appear, at the time when, and the place where, the warrant is returnable, and then and there abide the direction of the court, judge, or referee, as the case requires. The officer, taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offered as sureties, concerning their property and circumstances.

2 R. S. 535, § 13, am'd.

§ 2279. Sheriff to file undertaking with return.

The sheriff or other officer must file the undertaking, if any, taken by him, with the return to the warrant or writ of *habeas corpus*.

Id. § 16.

Where the proceeding is commenced by notice of motion, instead of an order, to show cause, or by an attachment, the irregularity is cured by appearing and answering without objection. An attachment has been granted in the first instance where an evasive return was made to writ of *habeas corpus*. *Matter of Stacy*, 10 Johns. 328. For enforcing an answer in equity where the witness positively refuses to obey a subpoena. *Andrews v. Andrews*, 2 Johns. Cas. 109; also, see *People v. Wilson*, 5 Johns. 368; *Stafford v. Hasketh*, 1 Wend. 71; *Worden v. Bank of Orange*, id. 94. The order to show cause should not be an adjudication that the defendant is guilty of the contempt, but only an order to bring him into court. *McCredie v. Senior*, 4 Paige, 378.

 Art. 4. Manner of Commencing the Proceeding.

It is said in *People v. King*, 9 How. 97, that an attachment should issue at once on violation of an order to pay over money. A warrant of attachment should not be granted *ex parte*, when the only proof is by an adverse party on information and belief; no excuse is offered by the affidavits of parties having knowledge if the facts are not produced. *Sargeant v. Warren*, 22 Week. Dig. 472. In contempt proceedings, to collect a personal tax, a notice of motion was held proper. *Matter of Nichols*, 54 N. Y. 62. But see language of section as it now stands, and *Sandford v. Sandford*, 40 Hun, 540. Attachment is the remedy against an attorney who refuses to pay over money which belongs to his client. *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489. The discretion of a judge in fixing time within which an attachment is returnable is in the discretion of the court, but reviewable at General Term. The attachment should be returnable before the judge by whom it is granted. But error is amendable, and is waived by giving a bond to the sheriff, at least so far as the validity of the bond is concerned. *Kelly v. McCormick*, 28 N. Y. 318; *Power v. Village of Athens*, 19 Hun, 169.

The proceedings to punish for contempt must be taken as prescribed by statute. They are *stricti juris*. The statute requires that there shall be served upon the accused before he is punished for contempt either an order to show cause why said punishment should not be inflicted or that there should issue a warrant of attachment to bring him before the court. But whatever mode is adopted it is necessary that certain facts shall be made to appear to the court. These facts are specified in § 2269, and one is that the judge must be satisfied by affidavit of the commission of the offence. Until this has been done no order to show cause can be issued. *Bradbury v. Bliss*, 23 App. Div. 606. As to power of referee appointed under § 1118 and of the court, respectively, to punish for contempt, see *Naylor v. Naylor*, 32 Hun, 228.

Precedent for Affidavit.

ULSTER SURROGATE'S COURT.

In the Matter of the Application to punish Oliver B. Whitney for a contempt.	}	75 N. Y. 425.
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To the Surrogate's Court of the County of Ulster:

That petition of Theophelia G. Townsend, of Newburgh, shows

 Art. 4. Manner of Commencing the Proceeding.

that she was a legatee under the will of John J. Ferris, deceased, late of said county.

That said proceedings were had in the estate of said deceased ; that one Oliver B. Whitney was duly appointed executor thereof on the 10th day of May, 1884, and entered on the duties of his trust and acted as such ; that on the 12th day of July, 1886, he made and filed his account as such executor in Ulster surrogate's court on notice to all parties interested, and a decree was duly entered in said surrogate's court, on such judicial settlement, in and by which your petitioner was adjudged to be entitled to receive the sum of \$1,200 as and for her said legacy, and said Oliver B. Whitney was directed to pay the same out of funds found to be in his hands as such executor. That said decree was duly docketed in Ulster County clerk's office, and execution issued thereon to the sheriff of Ulster County, where said Whitney then resided and now resides, and was returned wholly unsatisfied. That thereupon a certified copy of said decree of Ulster surrogate's court was served on said Whitney by the husband of your petitioner, proof of which is hereto annexed, and payment of said moneys demanded on behalf of your petitioner.

That said Whitney refused and neglected, and still refuses and neglects, to pay over said moneys, or any part thereof, and your petitioner, therefore, prays that a warrant issue out of and under the seal of this court, directed to the sheriff of the county of Ulster, commanding him to arrest the said Oliver B. Whitney, and bring him before this court forthwith, or at a time to be specified, to answer for his said offence.

THEOPHELIA G. TOWNSEND.

(*Add verification.*)

Precedent for Warrant to Attach.

The People of the State of New York to the Sheriff of the County of Ulster, greeting :

WHEREAS, It appears by the verified petition of Theophelia G. Townsend, that in and by a decree of this court, duly made and entered on the 12th day of July, 1886, Oliver B. Whitney, of the town of Marlborough, in the county of Ulster, was adjudged and directed to pay over to said petitioner the sum of \$1,200, being the amount of a legacy due her under the will of John J. Ferris, deceased, and that the said Oliver B. Whitney holds said moneys as executor of said Ferris, that a copy of said decree has been duly served upon him and demand of payment of said legacy made from him, and also that an execution duly issued on said decree has been returned wholly unsatisfied, and that the said sum of \$1,200 remains wholly unpaid, and the said Oliver B. Whitney neglects and refuses to pay over the same or any part thereof : Now, therefore, we command you to arrest the said Oliver B. Whitney, if he shall be found in your bailiwick, and bring him before a surrogate's court, to be held at the surrogate's office, in the city of Kingston, on the 10th day of April, 1887, at ten o'clock in the forenoon of that day, to answer unto us for his alleged offence, in refusing to pay over said legacy

 Art. 4. Manner of Commencing the Proceeding.

due, and directed to be paid as aforesaid, to Theophelia G. Townsend, the petitioner, and you are to make return on that day to the said surrogate's court, by a certificate under your hand of the manner in which you have executed this writ, and have you then and there this writ,

Witness, Hon. O. P. Carpenter, surrogate at the city of King-
[L. s.] ston, on the 1st day of April, 1887.

WALTER S. FREDENBURGH, O. P. CARPENTER,

Attorney for Petitioner. *Surrogate.*

Indorsed pursuant to § 2275, as follows:—"Let the said Oliver B. Whitney give an undertaking for his appearance to answer upon the within attachment in the sum of \$2,400."

O. P. CARPENTER,
Surrogate.

For other precedents for warrant of attachment, see Criminal Contempt.

Copies of the affidavits upon which the papers are granted should be served. *Matter of Smethurst*, 2 Sandf. 724; *Ward v. Arcuson*, 10 Bosw. 589. It is sufficient if a party charged with contempt has reasonable notice of an application to punish him, and was served with copies of the affidavits on which it was based. Papers once served and referred to in the order to show cause need not be again served. *Clark v. Binninger*, 43 N. Y. Supr. 126, affirmed, 75 N. Y. 344.

Where a party has appeared in an action by attorney, it is not necessary to serve him personally with an order to show cause why he should not be punished for contempt, such an order being commonly served on the attorney. *Matson v. Matson*, 5 Civ. Pro. 58. Where an order, that an administratrix show cause, was addressed to her individually, and not as administratrix, but the copy of the decree had been served and was referred to in the order, it was held the error might be amended. *Gillies v. Krcuder*, 1 Dem. 349. In a proceeding to punish for contempt, against agents of a city, it was objected that it did not appear that the summons and complaint in the original action had been served on the city, and the court allowed proof of such service to be made *nunc pro tunc*. The attachment was issued upon an affidavit also that the action was commenced by the service of a summons and complaint on the city. *Held*, that the original papers sufficiently showed that the city was a party to the action, and the order as to filing proof merely supplied additional proof of the fact. *People v. Dwyer*, 90 N. Y. 402. In proceed-

 Art. 4. Manner of Commencing the Proceeding.

ings to enforce the rights of a party who has recovered a judgment in a civil action, as for a contempt for refusing to comply with the judgment, personal service of the order to show cause is not indispensable, although it is in criminal contempts. The order may be served on the attorney. *Pitt v. Davison*, 37 N. Y. 235. Where attorneys appeared for the person adjudged guilty of contempt, after service on him of an attachment, he was held bound by their appearance and action. *Watrous v. Kearney*, 79 N. Y. 496.

Where an indorsement is made on the undertaking, as provided by § 2275, the moving party obtains security for the appearance of the party complained of, in case the undertaking is furnished; otherwise he is committed, as if no such indorsement were made, as is provided in the next section. The form for indorsement is given under § 2269, *supra*.

Precedent for Undertaking.

ULSTER SURROGATE'S COURT.

In the Matter of the Estate of John J. Ferris,
deceased.

} Title where proceeding is by order
to show cause.

WHEREAS, On the first day of April, 1887, a warrant of attachment issued out of the surrogate's court, commanding the sheriff of Ulster County to arrest Oliver B. Whitney, and bring him before the surrogate's court, to be held at the surrogate's office in the city of Kingston, on the 10th day of April, 1887, at ten o'clock in the forenoon; and

WHEREAS, Said warrant of attachment has been executed by said sheriff;

Now, therefore, we, Nathaniel H. DuBois and William H. Woolsey, both of the town of Marbletown, farmers by occupation, hereby undertake, jointly and severally, in the sum of \$2,400, pursuant to the statute and order of the court, that the said Oliver B. Whitney will appear in the said surrogate's court, in the city of Kingston, in the county of Ulster, on the said 10th day of April, 1887, at ten o'clock in the forenoon, and then there abide the direction and order of said surrogate's court.

NATHANIEL H. DuBOIS,
WILLIAM H. WOOLSEY,

(Add justification and acknowledgment.)

The form of return may be, when indorsed on the warrant, as follows:

ULSTER COUNTY, ss.:

I, George Young, sheriff of Ulster County, certify that pursuant to

Art. 5. Interrogatories and Proofs.

the command of the within warrant, I have arrested the within-named Oliver B. Whitney, and taken an undertaking in the sum of \$2,400, as directed by said warrant, executed by Nathaniel H. DuBois and William H. Woolsey, conditioned that the said Oliver B. Whitney will appear at the time and place required in said warrant.

Dated February 2, 1887.

GEORGE YOUNG,
By GEORGE DRUMOND,

Under Sheriff.

The fact that the attachment was directed to the sheriff of a county named therein, and generally to the sheriff of any county, does not invalidate the writ or proceedings had thereunder, as the particular direction may be rejected as mere surplusage. *People ex rel. Duffus v. Brown*, 46 Hun, 320.

ARTICLE V.

INTERROGATORIES AND PROOFS. § 2280.

§ 2280. Interrogatories and proofs.

When the accused is produced, by virtue of a warrant, or a writ of *habeas corpus*, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offence charged, cause interrogatories to be filed, specifying the facts and circumstances of the offence charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answer, and subsequent proofs, the court, judge, or referee, must determine, whether the accused has committed the offence charged.

Precedent for Answer to Petition.

ULSTER SURROGATE'S COURT.

The People *ex rel.* Theophelia G. Townsend,

agst.

Oliver B. Whitney.

75 N. Y. 425.

Or,

In the Matter of the Application to Punish Oliver
B. Whitney for a Contempt.

The answer of Oliver B. Whitney to the petition of Theophelia G. Townsend, filed in this court on the 1st day of April, 1887, shows to the court :

 Art. 5. Interrogatories and Proofs.

First. That the decree for non-compliance with which this attachment has issued was and is wholly merged in a judgment obtained against him, the said Oliver B. Whitney, for and by said Theophelia G. Townsend, on account of the sum directed to be paid her in and by the decree in the estate of said John J. Ferris, wherefore the petitioner should not be allowed to maintain this action.

Second. The said Oliver B. Whitney alleges that the said claim is actually owned by William G. Townsend, the husband of the petitioner, and that the petitioner is not the real party in interest, but that said William G. Townsend is the real party in interest.

Wherefore, the said Oliver B. Whitney asks that said writ of attachment be vacated and set aside with costs.

OLIVER B. WHITNEY.

(*Verification as to pleading.*)

Interrogatories are only necessary in cases where the act or omission constituting the contempt is either denied or not admitted, and when such act or omission is expressly admitted by defendant it is not necessary that interrogatories should be filed. *People v. Cartwright*, 11 Hun, 362. Interrogatories are unnecessary when the contempt consists of the admitted refusal to answer questions, and the party has been served with the affidavits and order to show cause, and is before the judge, and has full opportunity to answer. *Taylor v. Baldwin*, 14 Abb. 166; *Watson v. Fitzsimmons*, 5 Duer, 629; *People v. Campbell*, 40 N. Y. 133; *Pitt v. Davison*, 37 id. 235; *Lathrop v. Clapp*, 40 id. 328. Where the proceedings are instituted by an order to show cause, interrogatories are not necessary, even though the order does not show in what respect the injunction is claimed to have been violated, nor the punishment desired. *Mayor v. N. Y. & S. I. Ferry Co.*, 40 N. Y. Super. 300, affirmed, 64 N. Y. 622. And an order of reference may, in such a case, even in criminal contempts, send the matter to a referee without filing interrogatories. *People v. Alexander*, 3 Hun, 211. Where there was a motion for an attachment or other relief, and the matter was sent to a referee, and it was heard on his report, interrogatories were held to be waived. *Matter of Nichols*, 54 N. Y. 62. Interrogatories should be confined to the fact of the service of the order or process, and to the acts or neglects constituting the violation. *Brown v. Andrews*, 1 Barb. 227. (See form under next section.)

The fact that an order to show cause is irregular, where it does not mislead, is not ground for setting aside the order punishing for disobedience. *People v. Kenny*, 2 Hun, 346. If the order

Art. 5. Interrogatories and Proofs.

appears to be valid, the person served is bound to obey the order or move to set it aside; the only issues on the application to commit are as to the regularity of the proceedings and the excuse for disobedience. *Hilton v. Paterson*, 18 Abb. 245. After submitting to answer interrogatories, it is too late to raise the point that the judgment, which is the foundation of the proceedings, has not been served. *People v. Kearney*, 21 How. 74. Where, on an order to show cause, the judgment debtor fails to appear, and the county judge declares him in contempt, without further proof, it is irregular; the moving party must make out a case. *Tinkley v. Langdon*, 60 How. 180. If a party refuses to answer interrogatories, the order for commitment should specify such refusal as the misconduct; it is irregular to commit him for disobedience of the original order. *DeWitt v. Denise*, 30 How. 131. There must be clear proof of the disobedience to authorize punishment. *Potter v. Low*, 16 How. 549. And the accused party may read, in addition to his answers to interrogatories, affidavits negating wilful disobedience of the order for the violation of which it is sought to punish him. *People v. Murphy*, 1 Daly, 462. The moving party may read affidavits in reply. *Smith v. Smith*, 23 How. 134, affirmed, 14 Abb. 468. Where it is proper to impose any condition on vacating an attachment for contempt, this must be done in the first instance, and if an order vacating an attachment has once been entered, such order cannot be rescinded for the purpose of imposing a condition, nor can it be resettled or modified. *Matter of Bradner*, 87 N. Y. 171. It is no answer for an executor that the decree was made on joint petition of parties not entitled to join. *Estate of Kellinger*, 2 Civ. Pro. 68. The inability of the person disobeying may be considered. *Goodenough v. Davids*, 4 Law Bull. 35. In proceedings against the members of a common council for contempt, it is no defence that the assent of the mayor was wanting, or that their disobedience was harmless, or that the act enjoined was a nullity. *People v. Dwyer*, 90 N. Y. 402.

Order for Interrogatories.

The People *ex rel.* Theophelia G. Townsend,
agst.
 Oliver B. Whitney.

75 N. Y. 425.

It is further ordered, that the sheriff detain the said Oliver B. Whitney in his custody until the further order of the court.

O. P. CARPENTER,
Surrogate.

Interrogatories.

Interrogatories to be administered to Oliver B. Whitney touching a contempt alleged against him for non-payment of moneys held by him as executor of John J. Ferris, deceased, and which he has neglected and refused to pay over, pursuant to a decree of this court.

Second Interrogatory.—Did you then and there refuse to pay over said moneys, and have you not ever since neglected and refused so to do?

Third Interrogatory.—Did you not, at the time of service of such decree, state you had spent the money of the estate, and that no court could compel you to pay it over?

All of which interrogatories the said Oliver B. Whitney is required to answer as aforesaid, pursuant to order of surrogate's court.

Granted April 12, 1887.

PRESTON & CHIPP,

Attorneys for Petitioner.

The answer of Oliver B. Whitney to the interrogatories this day

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propounded to him in this matter pursuant to an order of this court :

First Interrogatory.—To this he answers that a copy of the decree therein set forth was served upon him, but that at what date he is unable to say.

Second Interrogatory.—To this he answers that he stated he was unable to pay the amount asked.

Third Interrogatory.—To this he answers to the effect therein set forth, but that no disrespect to the court was thereby intended, but that he only intended to say it was impossible for him to raise the money required.

Subscribed and sworn to be- } OLIVER B. WHITNEY.
fore me, April 10, 1887. }
O. P. CARPENTER,
Surrogate.

ARTICLE VI.

THE PUNISHMENT. §§ 2281-2286.

§ 2281. When and how accused to be punished.

If it is determined that the accused has committed the offence charged ; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee ; the court, judge, or referee must make a final order accordingly, and directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly.

§ 2282. *Id.* ; upon return of habeas corpus.

Where the accused is brought up by virtue of a writ of *habeas corpus*, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody, under the mandate, by virtue of which he is held by the sheriff, or other officer.

2 R. S. 560, § 5 (2 Edm. 580).

§ 2283. *Id.* ; upon return of order to show cause.

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion ; and if the determination is to the effect specified in the last section but one the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

§ 2284. Amount of fine.

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine

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must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

2 R. S. §§ 21 and 22, relating to contempts, am'd. See §§ 853 and 855.

§ 2285. Length of imprisonment.

Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. In such a case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment.

Id. §§ 23, 24, and 25, consolidated and am'd.

§ 2286. When court may release offender.

Where an offender, imprisoned as prescribed in this title, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made as prescribed in § 2457 of this act, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

Id. part of § 20; L. 1843, ch. 9, am'd; Co. Proc. § 302.

In a commitment made by a court of general jurisdiction, all the preliminaries to warrant the imprisonment need not be set out, and it need not recite that evidence sufficient to justify the commitment has been given although this is usual. *People v. Nevins*, 1 Hill, 154; *Davison's Case*, 13 Abb. 129; *People v. Oyer and Terminer*, 27 How. 14. But it must designate the particular misconduct of which the defendant is convicted. *De Witt v. Dennis*, 30 How. 131. And where a commitment of a witness for refusing to answer a question did not show the question was pertinent and legal, the prisoner was discharged on *habeas corpus*, *Matter of Quinn*, 2 Law Bull. 38. If the commitment is for non-payment of money, it must show refusal to pay, but if the ground is substantially stated and one in which the court had jurisdiction, the process will protect all engaged in the arrest. *Seaman v. Duryea*, 11 N. Y. 324. A commitment for refusing to deliver property must show on its face that the person committed had the custody of the property, and the court, on *habeas corpus*, may go back of the papers used on the motion to sustain or discharge a defective commitment. *People v. Connor*, 15 Abb. (N. S.) 430. Where a prisoner was committed for contempt on several charges, one being for contemptuous behavior, no specific act being stated, it

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was held bad. *Matter of Clark*, 2 Law Bull. 22. But, on the other hand, in *People v. Kelly*, 12 Abb. 150, affirmed, 24 N. Y. 74, it was held that a commitment for refusing to testify, on the ground of alleged prejudice, need not show affirmatively the facts recited on establishing that he was not entitled to the privilege, even though it state that he claimed the privilege, nor how the question was relevant, nor how the answer might affect the prisoner; and it is held, in *Rugg v. Spencer*, 59 Barb. 383, that a recital of these matters, though a very proper and formal part of an adjudication or order, is not a vital and conclusive part. Nor is it at all conclusive as to the facts which were made to appear before the officer, or that no other facts appeared. It is said, in *Allen v. Allen*, 8 Abb. N. C. 175, that a commitment to jail for contempt for refusing to pay costs in divorce proceedings was held not to be invalidated by the fact that the commitment recited costs, for the non-payment of which there could be no imprisonment, the prisoner not having paid or offered to pay the residue. But in *People v. Bergen*, 6 Hun, 267, a commitment was set aside, among other reasons, upon the ground that it was too broad. In *Yates v. Lansing*, 9 Johns. 395, it was held that full recitals were not necessary, and, also, in *Reynolds v. McElhone*, 20 How. 454, informal recitals were held sufficient. As to sufficient and insufficient recitals, see *Ford v. Ford*, 41 How. 169; *Ward v. Ward*, 6 Abb. (N. S.) 79. It does not deprive a court of jurisdiction, or prevent a final decision on the merits, for a court to suspend final action for a period, to enable the party in contempt to comply with the original order, or to perform some act as a substitute for such compliance. *People v. Bergen*, 53 N. Y. 404. The costs should be taxed and inserted in the order as part of the fine imposed. *Albany City Bank v. Schermerhorn*, 9 Paige, 372. For direction as to form of order, see *People v. Rogers*, 2 id. 103.

Where a defendant is ordered committed for contempt, it must be to the jail without the limits. *People v. Faucher*, 2 Hun, 226. See *Amerman v. Stokes*, Fourth Dept., Oct., 1886, 3 State Rep. 356, holding that the enforcement of orders and decrees directing trustees to pay over money is by an execution against the person, or a precept of commitment which would entitle a party to the benefit of the jail liberties. Punishment for a contempt cannot be inflicted in cases where an execution can issue, viz., on a

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final decree for a sum of money. An order committing the defendant for non-payment of referee's fees ordered to be paid is defective and should be reversed, if it fails to adjudicate, as required by Code of Civil Procedure, §§ 2281, 2283, upon the return of the order to show cause, that defendant has committed the offence charged, and that the offence was calculated to, or did, actually defeat, impair, or prejudice the rights and remedies of the plaintiff. *Mahon v. Mahon*, 50 N. Y. Super. 92. An order adjudging a person in contempt, and directing his commitment for a failure to pay alimony awarded in a divorce suit, need contain no adjudication that judgment could not be enforced by means of security, or the sequestration of his property. *Ryer v. Ryer*, 67 How. 369. In a surrogate's court, a warrant committing a witness for refusing to answer need not contain the particular interrogatories refused to be answered. *Matter of Jones*, 6 Civ. Pro. 250.

The fact that the defendant is given an opportunity to comply with the terms of the order before the commitment should issue does not affect the validity of the order. *Matter of Blumenthal*, 22 Misc. 704, 50 Supp. 49, 84 St. Rep. 49. A person who justifies as a surety on a bond to secure the release of premises from a mechanic's lien, and who claims he is the owner of property for which in fact he paid nothing, but gave a mortgage for the whole amount, and also for the costs of a building which he erected thereon, and which property he conveyed a month after his justification without consideration to the party upon whose property the lien existed, is guilty of misconduct, under subdivision 2 of § 14 of the Code of Civil Procedure, and such misconduct actually deceives and prejudices the rights and remedies of the petitioner, within the meaning of § 2281 of the Code of Civil Procedure, and the court should punish him by fine or imprisonment. *Matter of Hay Foundry & Iron Works*, 22 App. Div. 91. As § 2284 provides that in case of actual damage sustained by reason of misconduct proved against the offender, a fine sufficient to indemnify the aggrieved party must be imposed upon the offender. It was held, that where one fraudulently justified as surety on a bond to release property from a mechanic's lien, that the amount of his fine should be the amount due upon the mechanic's lien with the costs of the contempt proceedings. *Matter of Hay Foundry & Iron Works*, 22 App. Div. 91.

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Order Adjudging Defendants in Contempt.

(Captain.)

SUPREME COURT.

Archibald Sheffield *et al.*,*agst.*John T. Mitchell *et al.*

21 App. Div. 518.

An order to show cause why the defendants, John T. Mitchell and Henry H. Cooper, should not be punished for contempt for their misconduct in failing to obey the injunction order of this court of March 16, 1897, forbidding them and each of them from collecting, receiving, or in any way interfering with any moneys due or to become due from the United States Government on account of the purchase from the defendants Mitchell and Cooper of certain teas, which are the subject-matter of this action, and also for their misconduct in failing to obey the injunction order of April 13, 1897, herein heretofore and on the 29th day of May, 1897, having been granted by this court, and said matter having come on to be heard on the 14th day of June, 1897.

Now, on reading and filing the affidavits of ——— and ———, and upon the order to show cause herein, dated March 16, 1897, the summons and complaint herein and the affidavits upon which the order to show cause of March 16, 1897, was granted, and the affidavits of service thereon upon the defendants, and upon the order continuing the injunction herein, dated April 13, 1897, filed herein on the 13th day of April, 1897, and upon reading and filing the affidavits of service of the order to show cause herein verified June 6, 1897, and in support of this motion, and after reading and filing the affidavits of ——— in opposition thereto, and after hearing ———, counsel for the plaintiffs, in support of said motion, and after hearing ———, counsel for defendants Mitchell and Cooper, in opposition thereto, and due deliberation having been had thereon.

Now, on motion of Putney & Bishop, attorney for the plaintiffs, it is hereby

Ordered, adjudged, and decreed,

1. That the defendant Henry H. Cooper is guilty of the contempt of court in having wilfully disobeyed the injunction order made in this action on the 16th day of March, 1897, in that he received from the United States Government the sum of \$1,556.03, the proceeds of a portion of the teas mentioned in the complaint after the service upon him of the said order in violation of said order.

2. That said misconduct of said H. H. Cooper was calculated to and did actually defeat, impair, impede, and prejudice the rights and remedies of the plaintiffs herein to their actual loss and injury in the sum of \$1,556.03 besides the costs of this motion.

3. That the said H. H. Cooper for said misconduct is hereby fined the sum of 1,556.03, to be paid to the plaintiffs, being the said sum together with \$10 costs of this motion.

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4. That said H. H. Cooper be committed by the sheriff of the city and county of New York to the county jail in said county, to be there detained in close custody until he shall have paid said sum or he be discharged according to law, and that a warrant issue to execute this order unless within five days after the service on the defendants' attorney of a copy of the order herein said H. H. Cooper pay the sum of \$1,556.03 to James H. Kearney, the receiver duly appointed herein.

Enter.

HENRY R. BEEKMAN,
Justice Supreme Court.

Order Adjudging Defendant in Contempt.

At a surrogate's court, held in and for the county of Rockland, at the surrogate's office, in the village of Nyack, on the 3d day of February, 1897 :

Present :—Hon. A. S. Tompkins, *Surrogate.*

In the Matter of the Application of
Isaac E. Pye, etc.

154 N. Y. 773.

An amended final order and decree having been duly made and entered in this proceeding on the 18th day of January, 1897, removing Erastus Van Houten from his position as executor of the last will and testament of Edward G. Van Houten, deceased, directing that all authority and rights of the said Erastus Van Houten as such executor cease ; and enjoining him from in any way exercising control over or interfering with any property which belongs to the estate of said deceased, or which came into his possession as executor, and directing him upon the service upon him of a certified copy of said order and decree to pay and deliver over to Anna L. Van Houten and Della Van Houten, executrices of Edward G. Van Houten, deceased, or their representatives, all money and property, or the proceeds thereof belonging to the estate of said deceased, or which came into his possession as executor, and all property belonging to the estate of said deceased now in his possession and under his control, and particularly the business as a whole and all the goods and chattels which belonged to the testator in his lifetime, or which represent the proceeds of any such goods and chattels contained in the building situated at the corner of Church and Liberty Streets in the village of Nyack, wherein the livery stable business was heretofore carried on by the deceased in his lifetime, and that he vacate said building and cease from exercising control over its contents ; and a copy of said decree having been personally served upon the said Erastus Van Houten, said Erastus Van Houten then being in possession of assets which belong to said estate and which came into his possession as executor, and said Erastus Van Houten having refused to deliver possession of the said assets to Anna L. Van Houten and Della Van Houten, executrices of the will of said Edward Van Houten, deceased, or their representatives ; and hav-

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ing continued to exercise control over and to interfere with said estate in violation of said order of January 18, 1897; and an order to show cause having been duly issued out of this court on the 27th day of January, 1897, requiring the said Erastus Van Houten to show cause why he should not be punished as for a contempt of court in refusing to obey said order of this court made and entered on the 18th day of January, 1897, as aforesaid, and the said order to show cause having been duly personally served upon the said Erastus Van Houten, and the said Erastus Van Houten having duly appeared upon the return of said order to show cause in person and by attorney; and argument having been had thereon; and it appearing after due deliberation having been had therein that the said Erastus Van Houten is guilty of a contempt of court in having refused to obey the order of this court made and entered on the 18th day of January, 1897, as aforesaid.

Now, upon the order of this court made and entered on the 18th day of January, 1897, removing said Erastus Van Houten as executor of the last will and testament of Edward G. Van Houten, deceased, and upon the affidavit of Julius Henry Cohen, verified the 20th day of January, 1897, and of (insert names of any other affiants), and after hearing John M. Perry, Esq., of counsel for the petitioners, in behalf of said motion, and Garrett Z. Snider, Esq., of counsel for said Erastus Van Houten, in opposition thereto, upon motion of Mannice, Abbott & Perry, Esqs., attorneys for petitioners, it is

Ordered, adjudged, and decreed

1. That Erastus Van Houten is guilty of contempt of court in having wilfully disobeyed the amended final order and decree made in this proceeding on the 18th day of January, 1897, in that he continues in possession of the assets of the estate of Edward Van Houten, deceased, and refuses to deliver them up to the executrices who are rightfully entitled thereto, and continues to exercise control over and interfere with such assets.

2. That such misconduct of Erastus Van Houten was calculated to and actually did defeat, impair, impede, and prejudice the rights and remedies of the petitioners herein to their actual loss and injury in the sum of \$3,134.94 besides the costs of this motion.

3. That said Erastus Van Houten for such misconduct is hereby fined the sum of \$3,144.94, to be paid to the petitioners, being said sum, together with \$10 costs of this motion.

4. That said Erastus Van Houten be committed by the sheriff of Rockland County to the county jail of said county, to be there detained in close custody until he shall pay said sum or shall be discharged according to law.

5. That until the payment of said sums of money all proceedings herein on behalf of said Erastus Van Houten, except to review this order, be and they hereby are stayed.

A. S. TOMPKINS,
Surrogate.

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Order Discharging Attachment.

At a surrogate's court, held in and for the county of Ulster, at the surrogate's office, in the city of Kingston, said county, April 10, 1887 :

Present :—Hon. O. P. Carpenter, *Surrogate*.

The People *ex rel.* Theophelia G. Townsend,

agst.

Oliver B. Whitney.

} 75 N. Y. 425.

An application having been heretofore made by and on behalf of Theophelia G. Townsend as assignee under a certain decree made in this court, March 5, 1887, wherein and whereby Oliver B. Whitney and another, administrators of, etc., of John J. Ferris, deceased, were directed to pay certain sums of money to the assignors of said Theophelia G. Townsend, for a precept to arrest said administrators and bring them before this court, to answer to their alleged misconduct in refusing to pay said moneys, and such order having been granted, and an attachment issued thereon and been delivered to the sheriff, and the sheriff having brought the said Oliver B. Whitney before me by virtue thereof, and the said Theophelia G. Townsend having appeared by Preston & Chipp, her attorneys, and said Oliver B. Whitney by J. J. Linson, his attorney, and evidence having been taken and a hearing had, and the said Theophelia G. Townsend having moved for a commitment against said Whitney : Now, due deliberation having been had thereon, it is ordered that the application for a commitment and execution against the person in the form prescribed by law be and the same hereby is denied, and the order granting an attachment against said Whitney vacated. And it is further ordered that the said application is denied as a matter of law and not as a matter of discretion.

O. P. CARPENTER,

Surrogate.

Order granting warrant may follow substantially same form.

Precedent for commitment adapted from 1 Duer, 511 :

Warrant of Commitment.

The People of the State of New York to the Sheriff of the County of Ulster, greeting :

WHEREAS, On the 12th day of March, 1853, by an order made by the Superior Court, at a Special Term thereof, held at the city hall in the city of New York, in a proceeding brought by the People, on the relation of Thomas E. Davis and Courtlandt Palmer, against Oscar W. Sturtevant, it was ordered that the said Oscar Sturtevant be committed to the common jail of said county, there to remain charged with the con-

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tempt mentioned in said order for the period of fifteen days, as therein set forth, and thereafter until he shall have fully paid the fine imposed upon him, amounting to the sum of \$352.20, and further directing a warrant to issue to carry such order into effect: Now, therefore, we command you that you take the body of the said Oscar Sturtevant, and safely keep him in your custody in the common jail of the city of New York, for the period of fifteen days, and thereafter until such time as he shall have fully paid the fine imposed by said order, being the sum of \$352.20, with your fees thereon, or until he shall be discharged by order of this court. And you are to make return of this writ to our said court, under your hand, and certify the manner in which you shall have executed the same.

Witness, Hon. John Duer, one of the justices of the Superior
[L. s.] Court, at the city hall, in the city of New York, this 12th
day of March, 1853. HENRY WILKINSON,

JOHN HARPER,

Clerk.

Attorney for Relator.

Indorsed:—"By the court."

HENRY WILKINSON,

Clerk.

A decree was granted against defendant in divorce by which he was required to give security for the maintenance of plaintiff, a copy of the decree was served on defendant, and a demand for security and payment of costs made, which was refused; a bailable attachment was issued, and on its return a motion was made to vacate it. The court denied the motion, fined the defendant for misconduct, and ordered him to give the security. *Held*, that the court had jurisdiction to grant such relief as the facts and circumstances warranted; that it had authority to punish by fine or imprisonment, or either; and that it was sufficient to serve a copy of the decree, with a statement of the alimony unpaid, and a demand for the same; the fact that the decree authorizes an execution to issue in case of failure to pay the alimony does not estop plaintiff from enforcing its payment by proceedings for contempt. *Park v. Park*, 80 N. Y. 156. A reference having been made on a motion in an action for an injunction, and the order providing that the unsuccessful party should pay the referee's fees, the referee found the facts for defendant and caused a notice to be served on plaintiff stating that his report was ready, and the amount of his fees. Plaintiff not having paid the fees, the court, on proof, granted an order requiring plaintiff to pay within three days, or show cause why he should not be committed for disobeying the order, and on

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return of the order and proof of non-payment, an order directing the plaintiff to be committed for contempt, was granted. *Held*, error, as there were no facts showing, or adjudication holding, that the alleged misconduct defeated, impaired, impeded, or prejudiced any right or remedy of the defendant. *Fisher v. Raab*, 81 N. Y. 235. Where the defendant in divorce proceedings was allowed to answer after default, upon terms that he should pay certain counsel and referee's fees, and he answered, but did not pay all the fees ordered, and an order was made adjudging him guilty of contempt for such failure to pay, it was held that the court had power to strike out defendant's answer for his refusal to obey its orders. *Clark v. Clark*, 1 State Rep. 287. The surrogate's court has power to impose a fine upon a witness committed for contempt in refusing to testify, not exceeding the amount of costs and expenses, and \$250 besides. Although actual loss or injury be not shown, error therein cannot be reviewed on *habeas corpus* and *certiorari*. *Matter of Jones*, 6 Civ. Pro. 250. In an action by a wife against her husband for an absolute divorce, the court has power to strike out defendant's answer for his failure to comply with an order requiring him to pay alimony and counsel fees, such power not having been taken away by §§ 1773 and 2281, Code of Civil Procedure. *Brisbane v. Brisbane*, 5 Civ. Pro. 352.

The complaint of a party was stricken out as a punishment for a contempt for refusing to produce a paper in possession of his counsel in *Shelp v. Morrison*, 13 Hun, 110. Answer was stricken out. *Walker v. Walker*, 82 N. Y. 260. See, also, *McCrea v. McCrea*, 58 How. 220. An order to punish one for a contempt in the non-payment of alimony must adjudge that the failure to pay had defeated, impaired, or prejudiced the party applying therefor in his rights; if this is omitted the order is radically defective, and the punishment cannot be inflicted. *Mendel v. Mendel*, 4 State Rep. 556. The same principle is held as to invalidity of order in *Fall Brook Co. v. Hecksher*, id. 657. The application for a favor, by a party in contempt, will not be granted until he purges himself of the contempt. *Johnson v. Pinney*, 1 Paige, 646; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366; *Rogers v. Paterson*, 4 Paige, 450. Nor can the party in contempt apply to the court to take any aggressive steps, but he may appeal or move to set aside the order adjudging him in con-

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tempt; those are adjudging matters of right. *Matter of Steincrt*, 24 Hun, 246; *Brinkley v. Brinkley*, 47 N. Y. 40. A resident of the State, who, in disobedience of a decree in divorce rendered against him on the ground of adultery, which prohibits him from marrying again during the life of the divorced wife, goes to another State and there contracts another marriage, immediately returning to this State to live, cannot, while in such contempt, be permitted to prosecute an action against his second wife for divorce on the ground of adultery. *Marshall v. Marshall*, 2 Hun, 238.

As a general rule, the propriety of a commitment is not examinable by another court than the one by which it was awarded, but this is subject to the qualification that the conduct charged as constituting the contempt was such that some degree of delinquency or misbehavior can be predicated of it, for if the act is plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it does not become a contempt by being so adjudged. *Matter of Hackley*, 24 N. Y. 74; see *Mitchell's Case*, 12 Abb. 249. An order punishing for contempt in violation of an injunction can only be reviewed upon the merits, or for alleged legal error on appeal from the final order adjudging the contempt. *Watrous v. Kearney*, 79 N. Y. 496, reported below, 11 Hun, 584. Such a motion may be made when previous order was by default. *Tinkev v. Langdon*, 60 How. 180. Where an answer has been stricken out, the remedy is by application to the court to be let in. *Walker v. Walker*, 82 N. Y. 260. As to the right of appeal from a final order adjudging a party in contempt, see, also, *McCredie v. Senior*, 4 Paige, 378; *People v. Spaulding*, 10 id. 284; 7 Hill, 302; *Forbes v. Willard*, 37 How. 193; *People v. Healey*, 48 Barb. 564; *People v. Sturtevant*, 9 N. Y. 263; *Livingston v. Swift*, 23 How. 1; *Brinkley v. Brinkley*, 47 N. Y. 40; *Sudlow v. Knox*, 7 Abb. (N. S.) 411; *Carrington v. Fonda Railway Co.*, 52 N. Y. 583. Since the present Code it is held, in *Matter of Dissotway*, 91 N. Y. 235, that an appeal was properly taken from a decision of a surrogate's court refusing to adjudge a party in contempt and affirming the decree appealed from. Where no fine was imposed on defendant by way of punishment, but wholly for the purpose of indemnity, the General Term could not reduce the fine to an amount which, under § 2284, could be imposed by way of pun-

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ishment for defendant's misconduct, it having been imposed originally under this section. *Fall Brook Co. v. Heckscher*, 4 State Rep. 657.

In *Snyder v. Van Ingen*, 9 Hun, 569, an appeal to the General Term was sustained where a party had been discharged from imprisonment for contempt on *habeas*, and he was again brought before the judge, retried, and more severe penalties imposed. An appeal may be taken from the final order; it is not necessary that a commitment issue. *People v. Donohue*, 59 How. 417. The proper remedy to obtain relief by a party in contempt is by a motion in the court in which the order was granted; where a judge who made the order was no longer a member of the court, it was held the order was properly made before any judge sitting at Special Term. *Davidson's Case*, 13 Abb. 129; *People v. Murphy*, 1 Daly, 462. Where an attachment is regular on its face, with the recitals necessary to give jurisdiction, a party moving to set it aside for defects in the proceedings must show affirmatively the defect, or enough to throw the burden of proof on the other party. *Baker v. Stephens*, 10 Abb (N. S.) 1. In a case where it is proper to impose any condition on vacating a warrant of attachment for contempt, this must be done in the first instance, and if an order vacating an attachment has once been entered, such order cannot be rescinded for the purpose of imposing a condition, nor can it be resettled or modified. The mode of review is provided by Code, §§ 1356, 1357, this being a special proceeding. It is not necessary that an order should be final in order that an appeal may be taken from it. *Hart v. Johnson*, 7 State Rep. 133.

A warrant to punish for contempt need not specify the contempt nor any of the proceedings upon which the warrant rests. Disobedience to an order requiring the payment of money in court to the officers thereof, except where it is due upon a contract or for a breach thereof, may be punished as for contempt, although the amount thereof could be collected upon execution. Where there is no jurisdictional defect the court will refuse to review the mandate of another court of general jurisdiction on *habeas corpus*. *People ex rel. Pond v. Tamsen*, 15 Misc. 364. After the issue of a warrant of attachment the court cannot permit the accused to purge himself without making reparation as provided by the Code, §§ 2281 and 2284. *People ex rel. Baldwin*

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v. *Miller*, 59 St. Rep. 702, 9 Misc. 3. A commitment which imposes a fine of a specified amount, with interest from specified day, is sufficiently definite. *Estate of McMaster*, 14 Civ. Pro. 195. The commitment is not defective in omitting to recite, that notice was given to the party imprisoned of the application for orders which were entered to supply defects in preceding orders in the same proceeding, such preceding orders being mentioned in the commitment and notice having been given of the application upon which they were made. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 183, 11 St. Rep. 558. All that can be required in a commitment is, that it shall distinctly apprise person committed of the sum he must pay, in order to secure his release, provided it sets out that the contempt was calculated to and did defeat, etc., the remedy of the moving party. *Matter of Bernhard*, 16 St. Rep. 240. Provisions of § 2278 apply only to proceedings instituted by warrant of attachment and not to those commenced by order to show cause. *People ex rel. Post v. Grant*, 13 Civ. Pro. 305. This case was reversed on appeal, 50 Hun, 243, 20 St. Rep. 48, 3 Supp. 142; and it was held that under § 2285, it is not sufficient for the commitment to refer to another order and judgment as specifying the acts required to be done; the commitment must specify the act to be done, and no reference can be had to any other paper to supply the defect. The parties proceeding to enforce penalties for commitment must either proceed by arrest under a certified copy of the order, or by arrest under a commitment, but they cannot do both; they must elect their course of procedure and be governed by such election in all subsequent stages of the proceeding. It seems that if the commitment had recited the order so that it became part thereof, it would have been sufficient, but the order was not made part of the commitment by a simple reference to it. *People ex rel. Post v. Grant*, 50 Hun, 243, 20 St. Rep. 48, 3 Supp. 142. An order for the commitment of a witness for contempt is not necessary under § 856, although the offender is brought before the judge on an order to show cause. A commitment following the language of the statute is good. *In re McAdam*, 5 Supp. 387, distinguishing *People ex rel. McDonald v. Keeler*, 99 N. Y. 463. An order was made after notice, requiring a husband to pay to his wife certain arrears of alimony *pendente lite*, within a given number of days, and providing that upon non-compliance

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an order of arrest and commitment for contempt of court might issue; *held*, proper under § 2281. *Kuhn v. Kuhn*, 4 Supp. 952, 23 St. Rep. 387. An order committing a defendant in divorce for failure to pay alimony must adjudge that his failure to pay has defeated, impaired, impeded, or prejudiced plaintiff in his rights. *Mendall v. Mendall*, 4 St. Rep. 556. Whether or not the misconduct alleged did in fact defeat, impair, impede, and prejudice the complaining party, is to be determined from the facts and circumstances in the case. *Hart v. Johnson*, 43 Hun, 505. Where an order expressly adjudicates that the misconduct was "calculated to and did defeat, impair, impede and prejudice a right or remedy of the petitioner," and the evidence upon the reference supports that conclusion, it is sufficient as an adjudication of injury within § 2284. *Matter of Morris*, 45 Hun, 167. Where it was claimed that the order was void because it did not contain a statement that the disobedience referred to as the contempt, had defeated, impaired, impeded, or prejudiced some right of the defendants in the former action, and the contempt, the order, and the affidavit upon which it was founded, stated in detail the proceedings which it was claimed the disobedience affected, it was held that this was a full compliance with the requirements of the rule with respect to a contempt. *Fischer v. Langbein*, 103 N. Y. 84, followed, *Prince Mfg. Co. v. Princess Metallic Paint Co.*, 51 Hun, 443, 20 St. Rep. 923, 4 Supp. 348, affirming 2 Supp. 682.

A statement in the order that the contempt did hinder, etc., instead of saying in the words of the statute that the misconduct did hinder, etc., does not invalidate the order. *Wheelock v. Noonan*, 55 Super. Ct. 302. A husband cannot be imprisoned for non-payment of referee's fees, in proceedings against him for a divorce, by including that item in the order and judging him in contempt, but the error will not entitle him to discharge upon *habeas corpus*, unless the other items upon which he is properly imprisoned have been paid. *People ex rel. Clark v. Grant*, 13 Civ. Pro. 183, 11 St. Rep. 558. An order directing an assignee for creditors to pay over to the receiver all the assigned estate, the amount found due upon his accounting, is enforceable by execution under § 1240, and the failure to pay over cannot be punished as a contempt. *Matter of Hess*, 48 Hun, 586. The order judging a receiver in contempt for non-payment of money was held

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to be erroneous, where it was uncertain as to whether he was entitled to be allowed for alleged expenditures, and as to whether he had received the full amount specified, and where the order failed to state that damage to the estate of that amount had been caused by the non-payment. *Weston v. Watts*, 15 St. Rep. 123. A defendant against whom an injunction has been granted, of which he has been fully advised, and who acts in violation thereof, is liable to punishment for contempt. The rule in proceedings for contempt is analogous to that in prosecutions for crime, and the intent required to be proved is not the intent to violate the order of the court, but of the act which the law or the order of the court forbids. *Gage v. Denbow*, 49 Hun, 42. In determining whether parties are guilty of misconduct in failing to obey a lawful mandate of the court, no inquiry into its merits will be allowed. *Kochler v. Farmers and Drovers' Bank*, 14 Civ. Pro. 71. An order, though erroneous, is entitled to obedience. *People ex rel. Post v. Grant*, 13 Civ. Pro. 305, citing *People v. Sturtevant*, 9 N. Y. 263. A motion to punish defendants for contempt was granted, where, they being required by judgment to deliver a check to plaintiff, disobeyed the judgment. *Hatton v. McFaddin*, 15 Civ. Pro. 42, 16 St. Rep. 944. A witness cannot be punished for contempt for refusing to answer a question immaterial and irrelevant to the issue. *Matter of Odell*, 6 Den. 344. Proceedings to punish an administratrix for contempt in disobeying a decree directing the payment of money, are addressed to the discretion of the court; and if the respondent is unable to comply with the terms of the decree, and is in actual confinement for disobedience to it, and the circumstances are such as to commend an application for relief to the court an application to punish will be denied. *Estate of Battle*, 13 Civ. Pro. 27. An order of the surrogate directing an executrix to pay judgment is a decree, and can be made a foundation for contempt proceedings. *Matter of Bernhard*, 16 St. Rep. 241. See, also, as to the order directing the payment of petitioner's claim in the proceedings instituted by a creditor under § 717. *Estate of McMaster*, 14 Civ. Pro. 195. A failure to comply with the surrogate's order, directing payment of money, is not punishable as contempt until an execution against the property of the person proceeded against is issued and the demand required by § 2268 must be made by or on behalf of the party to whom the

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order requires the payment to be made. The proceedings must be instituted by order to show cause. *Union Trust Co. v. Gage*, 6 Dem. 358. To sustain proceedings for contempt for failure to comply with the order directing a person to discover and produce for inspection, books and papers, under § 803, the order must have been served on him personally; service on his attorney is insufficient. *Estate of Smith*, 15 St. Rep. 733. The committing or continuance of forbidden acts by the servants of a corporation after its general officers were advised of the issue of an injunction and order forbidding such acts, was held to be a contempt of court on the part of the corporation, equally as if there had been strict service of the injunction. *Rochester, etc., R. R. Co. v. Lake Erie & Western R. R. Co.*, 48 Hun, 190. To sustain proceedings to punish debtor for contempt, in disobeying the restraining provisions of order in supplementary proceedings, it must be shown that the legal title to the property transferred was in the debtor. *Beard v. Snook*, 47 Hun, 158. A motion to punish a judgment debtor for refusal to submit to examination before a referee in supplementary proceedings, was denied where it appeared that such referee, and the attorney for the judgment creditor, had offices in the same building. *Gilbert v. Frothingham*, 13 Civ. Pro. 288. An executor for conduct prejudicial to the legatees in failing to account for funds in his hands when ordered to do so, is guilty of contempt and properly fined the value of the property misappropriated. A fine of this character is for the benefit of the creditors. *Matter of Pye*, 18 App. Div. 306, affirmed, 154 N. Y. 773. Where a court having jurisdiction grants an injunction order it is the duty of the person enjoined to obey the injunction until it is vacated; for disobedience thereto he is guilty of contempt, and it is no answer to allege that the plaintiff had no cause of action and was not entitled to recover. A fine of an amount of money equal to that collected and used by the defendant in violation of the injunction order was held to be properly imposed. *Sheffield v. Cooper*, 21 App. Div. 518. The fact that the defendant has been given by the terms of the order an opportunity to comply with the order before commitment issues does not affect the validity of the order. *Matter of Blumenthal*, 22 Misc. 704, distinguishing *Bradbury v. Bliss*, 48 N. Y. Supp. 912.

In proceedings to have defendant adjudged guilty of contempt under subdivision 2 of § 14, in procuring a stay of proceedings on

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appeal by putting in fictitious sureties to the undertaking, and in which an order was made adjudging him guilty of contempt, it was held essential to the validity of the order that an adjudication or decision appear establishing that the person for whose benefit the fine was imposed has in truth and fact been prejudiced by the illegal proceedings complained of. *Clary v. Christie*, 41 Hun, 566. A precept or commitment may not be issued without an adjudication of contempt, nor without proof that the contempt has injured a creditor in his right or remedy. *Blake v. Bolte*, 10 Misc. 333, 31 Supp. 124, 63 St. Rep. 408, 24 Civ. Pro. 166. Misconduct which can be punished as a civil contempt must be such as to defeat, impair, etc., the right of a party, and it must appear that the alleged misconduct has that effect. A person cannot be punished for failing to pay over money or stand committed for contempt until a second order be made after his refusal to pay the money, a copy of the first order having been served upon him and a demand made for the moneys directed to be paid thereby. *First Nat. Bank of Plattsburgh v. Fitzpatrick*, 80 Hun, 75, 61 St. Rep. 766. An order adjudging a person in contempt for disobedience which omits to state that the misconduct complained of defeated, impaired, etc., the right or remedy of a party, is fatally defective. *Wolf v. Buttner*, 57 St. Rep. 861, 6 Misc. 119. A warrant of attachment for contempt which is not based upon a final order adjudging contempt and directing punishment is insufficient on *habeas corpus* proceedings to justify the retention of the respondent. *Matter of Crosher*, 25 Abb. N. C. 89, 11 Supp. 504. The amount of fine which may be imposed under §§ 2281-2284 must be based upon proof of damages actually sustained. *Moffatt v. Herman*, 116 N. Y. 131, citing *Sudlow v. Knox*, 7 Abb. (N. S.) 411; *Dejonge v. Brennenman*, 23 Hun, 332; *Clark v. Biningner*, 75 N. Y. 344; *King v. Flynn*, 37 Hun, 329; *Moffatt v. Herman*, 116 N. Y. 131, 17 Civ. Pro. 357, affirming 17 Abb. N. C. 107, reversing 8 Civ. Pro. 369, is distinguished in *Martin Cantine Co. v. Warshauer*, 7 Misc. 412, where it is held that where a false answer was interposed which prevented plaintiff from collecting a claim which he could have otherwise collected, the party interposing the answer is guilty of contempt. S. C. 23 Civ. Pro. 379, 28 N. Y. Supp. 139, 58 St. Rep. 569. In proceedings to punish for contempt in refusing to produce books of a corporation, as required by an order and subpœna, the power of the court to

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award an allowance by way of indemnity for legal expenses must be exercised upon evidence in legal form, as upon the trial of an action. *Fenlon v. Dempsey*, 50 Hun, 131, 19 St. Rep. 231, 2 Supp. 763, 22 Abb. N. C. 114, 15 Civ. Pro. 393. The requirement that the commitment for contempt "must specify . . . the duration of the imprisonment" does not apply to the class of contempts named in the first part of that section "where the misconduct proved consists of an omission to perform an act or duty, which it is in the power of the offender to perform," but the commitment in such case need only specify "the act or duty to be performed, and the sum to be paid." *Anonymous*, 18 Abb. N. C. 216. A person adjudged guilty of contempt in not appearing and submitting to examination in supplementary proceedings can be fined only the costs of the proceedings. *De Witt v. Gunn*, 68 St. Rep. 790, 24 Civ. Pro. 406, citing to the point that the fine is limited to the actual injury. *Fenlon v. Dempsey*, 50 Hun, 131, 26 St. Rep. 243, 19 St. Rep. 231. Where it appears that an order has been made that a receiver has moneys in his hands which he failed to pay over on demand, actual loss and injury are sufficiently shown to justify an order for his commitment. Such an order is regular notwithstanding the fact that the court did not impose the payment of the indemnity in the form of a fine, it being sufficient to state in the order that the moving parties were injured to a certain amount and requiring its payment. It is not necessary to specify the duration of the imprisonment, as under § 2285 it is provided that where the misconduct in question consists in the omission to perform an act or duty which it is in the power of the person to perform, he shall be imprisoned until he performs such act or pays the fine imposed. Where there is no proof of what the costs and expenses had been, it was held erroneous to fix them at the sum of \$250. *People ex rel. Surety Co. v. Anthony*, 7 App. Div. 132, citing *People ex rel. Clark v. Grant*, 11 St. Rep. 559. It seems there must be an express adjudication within the exact language of the statute, that the conduct complained of has been such as to defeat, impair, etc., and that an order imposing a fine where there is no such adjudication, should be reversed. *Dinsmoor v. Commercial Travellers' Association*, 14 Supp. 673, 38 St. Rep. 626. Where a person, upon whom a subpoena has been served, has been adjudged to have committed a contempt in refusing to obey it, the court is expressly authorized by § 2284 to

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impose a fine for the disobedience of the subpoena, though no actual loss or injury to the party subpoenaing him has been occasioned. *People ex rel. Duffus v. Brown*, 46 Hun, 320, distinguishing *Carrington v. Hutson*, 28 Hun, 371.

The court may punish for contempt one who fails to produce books pursuant to a subpoena *duces tecum*. The imposition of the fine is not limited to a case where actual loss or injury is not shown. *Holly Mfg. Co. v. Vennor*, 26 Supp. 581. In the absence of evidence that the defendant's disobedience occasioned any actual loss or injury to the plaintiff beyond costs and expenses of the proceedings to punish, a fine to the amount of the judgment is not authorized. *Devereaux v. Clifford*, 11 App. Div. 401. Citing *Fall Brook Coal Company v. Hecksher*, 42 Hun, 534, which holds that in such a case the court should fine the defendant not exceeding \$250 in addition to costs and expenses of the proceedings, and directing his imprisonment until he should appear and submit to examination and pay the fine and costs imposed upon him. It seems that the provisions of § 2284 as to punishment of a party for violation of an order are not exclusive of other proceedings, and that an action may be maintained even where the contempt proceedings are authorized. *Porous Plaster Co. v. Seabury*, 43 Hun, 611, 7 St. Rep. 249. Contempt proceedings cannot be maintained after an injunction has been dissolved or otherwise ended to punish a party for previous violation of the mandate. *Tabor v. Manhattan Ry. Co.*, 14 Misc. 189, citing *Peck v. Yorks*, 32 How. Pr. 408; *Moat v. Holbein*, 2 Edw. Ch. 188; *Murad v. Thomas*, 6 St. Rep. 662. One who falsely justifies as surety on an undertaking given to discharge an attachment is guilty of contempt under subdivision 4, § 14, of the Code. Where a person is adjudged guilty and fined or directed to perform some act within his power as a punishment, the commitment need not specify the term of imprisonment. *People ex rel. Wise v. Tamsen*, 17 Misc. 212. An order adjudging defendant in contempt for refusal to deliver certain property is void where it is shown that the title to the property is in dispute. Where there is no proof of loss to creditors, an order committing defendant for refusal to deliver property to the receiver until he pay a fine of \$500 is erroneous, since under § 2284 the court can summarily fine a party for misconduct only to an amount of \$250 and costs. *Gallagher v. O'Neill*, 3 Supp. 126, 21 St. Rep. 163. Courts will

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not permit the course of justice to be stayed or prevented by fictitious sureties or fraudulent bail. Where a worthless surety has been imposed on the court, the fraudulent surety will be punished by a fine to the end that the loss occasioned be made good if possible. *Diamond v. Knocpel*, 3 St. Rep. 291, citing *Hill v. L'Eplatinier*, 5 Daly, 534; *Eagan v. Lynch*, 3 Civ. Pro. 236; *Nathans v. Hope*, 5 Civ. Pro. 401. A party is properly adjudged guilty of contempt in not obeying an injunction order, unless it is void for lack of jurisdiction on the part of the judge granting it, and may properly be punished for disobedience thereto. *People v. Van Buren*, 136 N. Y. 252. The giving of worthless sureties upon a bond to discharge a mechanic's lien is contempt of court for which the party may be fined under § 2284. It is not alone the right of the lienor to ultimate recovery in an action of foreclosure which is affected by the giving of the worthless bond. The bond takes the place of the property, and the law contemplates substantial security to the lienor. When such a bond is given, the validity of the lien is assumed and the right of the lienor to complete security in the place of the land is unquestioned. The fine must be limited to such an amount as to indemnify the aggrieved party for the actual loss and injury sustained so far as that loss is in excess of \$250 and costs. It seems that the court has power as a condition of waiving imprisonment which it has a right to impose, to exact the performance of conditions which could not be imposed as a fine. *McAveny v. Brush*, 1 App. Div. 97, 68 St. Rep. 178.

The court has no right to fine arbitrarily, or to take the opinion of the injured party as a standard, but the adjudication as to damages must be based on evidence. *Simmonds v. Simmonds*, 6 Week. Dig. 263. The amount of a fine is a matter of computation. *Sudlow v. Knox*, 7 Abb. 411. But where there has been actual injury, the court cannot impose a mere nominal fine. *Lansing v. Easton*, 7 Paige, 364. The amount of the fine to indemnify must be fixed upon proof of the damages sustained, according to the rules of law which would apply in an action for damages. *Sudlow v. Knox*, 4 Abb. Ct. App. Dec. 326. The question of damages may be heard before a referee as part of the contempt proceedings, and where the testimony showed that the party charged had, contrary to the prohibition of an injunction, collected and appropriated a certain sum of the assets

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of the moving party, it was held that *prima facie* the plaintiff was damnified to that extent by the transaction. *Hartcau v. Deer Park Blue Stone Co.*, 3 T. & C. 763. The party in contempt must be imprisoned till the fine is paid. *Lansing v. Easton*, 7 Paige, 364; *People v. Compton*, 1 Duer, 512, affirmed, 9 N. Y. 263. A fine in the amount of the costs and expenses is all that is proper, unless there is an adjudication that the act has produced loss. *People v. Oliver*, 66 Barb. 570. The degree of punishment to be inflicted is limited by this section to a fine sufficient to indemnify the aggrieved party for the actual loss or injury inflicted by the misconduct, and to sustain the imposition of a fine for loss or injury the fact of the existence of the loss must be proved by competent evidence. *Fall Brook Co. v. Hecksher*, 4 State Rep. 657. Where there is an adjudication that the misconduct was calculated to, or did defeat the rights or remedies of the moving party, a fine is proper and is limited to \$250, unless actual loss or injury has been suffered, when the fine will cover such loss. In case of no pecuniary loss, only the necessary costs and expenses will be imposed. *People v. Compton*, 1 Duer, 512; *Clark v. Bining*, 75 N. Y. 344; *Erie R. R. Co. v. Ramsey*, 45 id. 637. A party in contempt cannot be imprisoned until he performs some designated act, unless he was previously required to do so by the court, and omitted to perform it. *Simmonds v. Simmonds*, 4 Week. Dig. 130. Where the court, in punishing a violation of an injunction, ordered a party to pay certain damages as well as costs, and it did not clearly appear such damages had in fact resulted from the act complained of, the order was reversed. *Lyon v. Botchford*, 25 Hun, 57. The rule that actual indemnity to the party will be given, and upon evidence of the facts was held in *Dejonge v. Brenneman*, 23 Hun, 332; *King v. Flynn*, 37 id. 329. In supplementary proceedings the value of the property disposed of, and not the amount of the judgment, regulates the amount of the fine. *Reynolds v. Gilchrest*, 9 Hun, 203; *Ross v. Clussman*, 3 Sandf. 676; *Feely v. Glennen*, 2 Law Bull. 19. Where \$500 was allowed for loss and injury, on violation of an injunction, it was held on appeal to be not as costs, but under § 2284, for actual damages sustained by the misconduct of the defendant. *Brett v. Brett*, 33 Hun, 547. On proceedings to punish for contempt of mandamus, the fine is limited to costs and expenses of the contempt proceeding,

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where the contempt is not wilful, and no pecuniary loss has been sustained. The costs in the mandamus case cannot be included. The court may include as a fair item of expense a compensation to the relator's attorney for his expenses in the proceedings. *People v. State Line R. R. Co.*, 14 Hun, 371, affirmed, 76 N. Y. 294. A counsel fee in excess of cost and expenses cannot be added (compare 33 Hun, 547, above) to the fine sufficient to indemnify the party, but it does not invalidate the order. The party may be held till he pays the legal items. *People v. Jacobs*, 66 N. Y. 8. The council fees are limited to the contempt proceedings. *Van Valkenburgh v. Doolittle*, 4 Abb. N. C. 72. Where the contempt consists of interfering with perishable property, the order should not absolutely require its return, but should liquidate its fair value to be repaid if a return is impossible. *Albany City Bank v. Schermerhorn*, 9 Paige, 372, reversed on another point, 10 id. 263.

A person interfering with property in the possession of a receiver under a mistake of law will be chargeable with the costs of the proceedings against him for contempt, though he may be excused from further punishment. *Noe v. Gibson*, 7 Paige, 513. Where the party accused acted in good faith, only motion fees and disbursements were charged against him. *People v. Cooper*, 20 Hun, 486. Where the sheriff refused to take the person charged before an officer to give bail, no fees were allowed him as against the party in his custody. *People v. Tafft*, 3 Cow. 340. Where a defendant in disobeying an injunction acted under the erroneous advice of his counsel, that it was suspended by an appeal taken, the fine should not exceed plaintiff's actual damages and costs, no counsel fees to be included. *Power v. Athens*, 19 Hun, 165. The power of the legislature to punish for a criminal contempt is fully discussed in *McDonald v. Keeler*, 99 N. Y. 463.

ARTICLE VII.

MISCELLANEOUS PROVISIONS. §§ 2287-2291.

§ 2287. Offender liable to indictment.

A person, punished as prescribed in this title, may, notwithstanding, be indicted for the same misconduct, if it is an indictable offence; but the court, before which he is convicted, must, in forming its sentence, take into consideration the previous punishment.

2 R. S. § 26.

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§ 2288. Proceedings when accused does not appear.

Where a person, arrested by virtue of a warrant of attachment, has given an undertaking for his appearance, as prescribed in this title and fails to appear, on the return day of the warrant, the court may either issue another warrant, or make an order, directing the undertaking to be prosecuted; or both.

Id. § 27.

§ 2289. Undertaking; when prosecuted by person aggrieved.

The order directing the undertaking to be prosecuted, may, in the discretion of the court, direct the prosecution thereof, by and in the name of any party aggrieved by the misconduct of the accused. In such a case, the plaintiff may recover damages, to the extent of the loss or injury sustained by him, by reason of the misconduct, together with the costs and expenses of prosecuting the special proceeding in which the warrant was issued; not exceeding the sum specified in the undertaking.

Id. §§ 28 and 29, am'd; Co. Proc. § 371.

§ 2290. Id.; by attorney-general, etc.

If no party is aggrieved by the misconduct of the accused, the order must, and, in any case where the court thinks proper so to direct, it may direct the prosecution of the undertaking, by the attorney-general, or by the district attorney of the county in which it was given, in the name of the people. In an action, brought pursuant to the order, the people are entitled to recover the entire sum, specified in the undertaking. Out of the money collected, the court, which directed the prosecution, must direct that the person, at whose instance the warrant was issued, be paid such a sum as it thinks proper, to satisfy the costs and expenses incurred by him, and to compensate him for loss or injury sustained by him, by reason of the misconduct. The residue of the money must be paid into the treasury of the State.

Id. §§ 30 and 31.

§ 2291. Sheriff liable for taking insufficient sureties.

After the return of an execution, issued upon a judgment, rendered in an action upon the undertaking, an action, to recover the amount of the judgment, may be maintained against the sheriff, where it appears that, at the time when the undertaking was given, the sureties were insufficient, and the sheriff had reasonable grounds to doubt their sufficiency. Such an action may be maintained by the plaintiff, in whose favor the judgment was recovered. If the people were plaintiffs the action must be prosecuted by the attorney-general or the district-attorney: and any money collected therein must be disposed of, as prescribed in the last section.

Id. § 32.

Where a party has been arrested upon an attachment for a contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and is adjudged to have been guilty of the misconduct alleged, and punishment by fine, and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offence. *Barton v. Butts*, 32 How. 456. Where the defendant in such a proceeding has not appeared at all, and

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the bond has been prosecuted in pursuance of such an order, the court may still allow him to appear upon terms at a future term, and answer interrogatories to be filed touching the contempt. S. C., citing *People v. Munro*, 15 How. 494.

Precedent for Order to Prosecute Bond.

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, June 12, 1887 :

Present :—Hon. S. L. Mayham, *Justice*.

The People *ex rel.* John Cromwell,

agst.

Marinda Wheeler.

An undertaking having been heretofore made and filed by Henry Wilson and John Merchant, conditioned that Marinda Wheeler, the defendant herein, should this day appear at this term of this court, on an attachment against her to answer for an alleged contempt in refusing to pay over to John Cromwell the sum of \$850 in her hands, applicable to the payment of a certain judgment against her, as directed by the court, and the said Marinda Wheeler having failed to appear, according to the terms of said undertaking : Now, on motion of E. D. Ronan, attorney for relator, it is ordered that said undertaking, given as aforesaid, be prosecuted by and in the name of the relator, John Cromwell, and for his benefit, pursuant to the provisions of the Code of Civil Procedure.

S. L. MAYHAM,
Justice Supreme Court.

Section 2283 seems to contemplate the imprisonment of the party in contempt upon the order alone, a certified copy taking the place of the warrant. The precedent, therefore, given for warrant, committing to jail after adjudication, will only be necessary where the proceeding was commenced by attachment under § 2269, as there seems to be no provision for the imprisonment of the party adjudged in contempt, in such case, except by § 2281, requiring a commitment. The former practice required a commitment in any event, and the precedent given may be used even under § 2283, for greater caution.

A person committed for contempt for non-payment of moneys, as ordered by the court, is not entitled to the jail liberties on giving the usual bond. *People v. Bennett*, 4 Paige, 103; *People v. Rogers*, 2 id. 103; *People v. Cowles*, 4 Keyes, 38; *Eagan v. Lynch*, 3 Civ. Pro. 236; *Clark v. Clark*, 2 Law Bull. 211; *Matter of*

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Clark, 20 Hun, 551. *Contra, Ward v. Ward*, 6 Abb. (N. S.) 79, appeal dismissed, 81 N. Y. 638. The history of the power of courts of chancery and surrogates' courts to punish as for contempt for failure to pay over moneys as directed by decree, is considered. *People v. Marshall*, 7 Abb. N. C. 380. The distinction between the commitment for contempt for non-payment of money and upon conviction for misconduct, is discussed and pointed out by Woodruff, J., in *People v. Cowles*, 4 Keyes, 38. And it is said that in the former case the process is strictly and purely remedial, and in the latter preventive, and in most instances wholly so.

Where a judgment debtor, on being arrested on an attachment, at once submits himself to examination, the court will ordinarily accept his excuse and discharge him from arrest, but not where the debtor puts the creditor to expense, and raises all possible objections. *Hilton v. Patterson*, 18 Abb. 245. It was said in *Lansing v. Easton*, 7 Paige, 364, that there was no way in which a defendant imprisoned for a fine could be released, except by consent of the prosecutor, until payment of the fine. This was before the statute of 1843. The application to be discharged must be on notice to the adverse party. *Strobridge v. Strobridge*, 21 Hun, 288. Where the inability appears to be wilful, the party will not be discharged. *Lansing v. Lansing*, 41 How. 248. Where, on an application to be discharged for inability to pay, the affidavit denied the contempt for which he was committed, it was held that as he denied a fact which had been adjudicated against him, he could not be believed as to the other statements, and the application was denied. *Palmer v. Kelly*, 4 Sandf. Ch. 575. An attorney who had been confined in jail upward of three months, for non-payment of a fine imposed for contempt, applied to be released because of inability to pay; under the circumstances, it appearing he had given bail for \$1,000 on his arrest, the order discharging him was reversed, unless he would give a bond for payment of the fine. *Matter of Steinert*, 29 Hun, 301. The expression "unable to endure the imprisonment" contemplates something in the nature of a slow wasting, a steady diminution of the vital forces, tending unless arrested by sunlight, open air, etc., to a complete destruction of the constitution; it does not apply to malarial fever. *Moore v. McMahon*, 20 Hun, 44. In *Mitchell v. Hall*, 3 Law Bull. 23, it is questioned

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whether power to relieve the defendant is given solely to the court out of which the process issued, when commitment was made under § 2457 of the Code.

ARTICLE VIII.

APPEAL.

An appeal can only be taken from a final order in contempt proceedings and not from a conditional order. *Greite v. Heinrichs*, 53 St. Rep. 851, 71 Hun, 11, 24 Supp. 546.

A proceeding to punish a party for contempt instituted by an order to show cause to enforce a judgment in an action is not a special proceeding, but a proceeding in an action, and is, therefore, not appealable to the Court of Appeals. *Jewellers' Mercantile Agency v. Rothschild*, 155 N. Y. 255.

A proceeding to punish defendant for contempt to enforce a civil remedy instituted by an order to show cause is a proceeding in an action and not a special proceeding; an order made therein, even if final, not being made in a special proceeding, is not appealable as of right, to the Court of Appeals. Where an order adjudging defendant guilty of contempt and imposing a fine also contains provisions for a reference to take proof and report as to the damages sustained by the plaintiff by the acts and misconduct of the defendant, it is an interlocutory and not a final order, and consequently not appealable, as such. *Ray v. N. Y. Bay Extension Bay Co.*, 155 N. Y. 103, dismissing appeal from 20 App. Div. 539; *Jewellers' Mercantile Agency v. Rothschild*, 155 N. Y. 255, following *Pitt v. Davison*, 37 N. Y. 235.

The appellate division has no power to review an order made by a surrogate's court denying a motion to vacate an order punishing a person for contempt in failing to obey a former final order and decree of the same court, and removing him as an executor of an estate. *Matter of Pye*, 23 App. Div. 206; *sub. nom. Van Houten v. Pye*, 48 Supp. 865, 82 St. Rep. 865.

CHAPTER XV.

CRIMINAL AND LEGISLATIVE CONTEMPTS.

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ARTICLE I.

CRIMINAL CONTEMPTS. §§ 8-13, Code Civil Procedure. § 143, Penal Code.

§ 8. Criminal contempt defined.

A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others :

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

2 R. S. 276, § 10.

§ 9. Punishment for criminal contempts.

Punishment for a contempt, specified in the last section, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Id. § 11.

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§ 10. Such contempts in view of court; how punished, etc.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defence.

Id. § 12.

§ 11. Requisites of commitment.

Where a person is committed for such contempt, the particular circumstances of his offence must be set forth in the mandate of commitment.

Id. § 13.

§ 12. Preceding sections limited.

The last four sections do not extend to a special proceeding to punish a person, in a case specified in § 14 of this act.

Id. § 14.

§ 13. Indictment, if offence is indictable.

Punishment for a contempt, as prescribed in this article, does not bar an indictment for the same offence; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment.

Id. § 15.

§ 143. [Penal Code]. Criminal contempts.

A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority.

2. Behavior of the like character, committed in the presence of a referee or referees, while actually engaged in a trial or hearing, pursuant to the order of the court, or in the presence of a jury, while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law.

3. Breach of the peace, noise, or other disturbance, directly tending to interrupt the proceedings of a court, jury, or referee.

4. Wilful disobedience to the lawful process or other mandate of a court.

5. Resistance wilfully offered to its lawful process or other mandate.

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory.

7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full, and fair report of a trial, argument, decision, or other proceeding had in court.

Any disorderly, contemptuous, or insolent behavior committed in the presence of any one of the constituent members of the court, while engaged in the business devolved upon it by law, is a contempt committed upon it in the immediate view of the court within the statute. The case of the newspaper reporter in secreting himself in a room, into which the jury of the Court of Oyer and Terminer were about to retire, remaining there, and, overhearing their deliberation, taking short notes thereof, and

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subsequently printing his recollection of the debate between the members of the jury, amounts to a criminal contempt committed in the immediate view and presence of the court, and the fact that the person committing the contempt was, when discovered, brought before the judge, who had no personal knowledge of the offence and consequently allowed him to depart, does not constitute a judicial determination upon the offence, and subsequent proceedings, by order to show cause, are not objectionable as placing the respondent twice in jeopardy. *Matter of Choate*, 24 Abb. N. C. 430, 18 Civ. Pro. 180, 8 N. Y. Crim. 1, 9 Supp. 321, 56 Hun, 351, 30 St. Rep. 728, 18 Civ. Pro. 230, 8 N. Y. Crim. 31, affirmed without opinion under title *People ex rel. Choate v. Barrett*, 121 N. Y. 678. (See Civil Contempt, *ante*, and cases cited.) Proceedings for punishment for criminal contempt are not provided for in the Code of Criminal Procedure, nor is a criminal contempt there defined, or a punishment prescribed, except in § 619, which refers to cases of disobedience to process, and refusal to answer as witness, and in these cases the remedy is referred to the procedure prescribed in civil cases provided for in the Code of Civ. Proc. No provision is made in the Code of Civ. Proc. for proceedings to punish for contempt, or to review any order made in such proceeding. *People ex rel. Taylor v. Forbes*, 143 N. Y. 220, reversing 77 Hun, 612. A punishment as for a criminal contempt imposed in a proceeding based upon the publication of newspaper articles concerning the judge and proceedings in his court cannot be sustained when the final order entered in the proceeding fails to state the principal circumstances of the offences as required by § 11, so as to show whether or not the adjudication rested upon the only ground on which a criminal contempt can be based upon a publication, namely, the publication of a false or grossly inaccurate report of the proceedings of the court under § 8. *People ex rel. Barnes v. Court of Sessions of Albany County*, 147 N. Y. 290, reversing 82 Hun, 242. In 82 Hun, it is held, that the practice of the courts for the punishment of a criminal contempt is not regulated, except as prescribed by § 10 of the Code of Civil Procedure, that the provisions of §§ 2266 to 2292 of the Code refers to the practice in cases of civil contempt and not to cases enumerated in § 8 of the Code, except as to the acts enumerated in § 8, also enumerated in § 14, and which have resulted in the rights of remedies of a party to a civil

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action or special proceeding being defeated, impaired, etc. The refusal of a witness to answer a proper question before a grand jury is punishable as a contempt. When the refusal was reiterated in the presence of the court and in the presence of the witness and he did not deny, but justified the same and reiterated his refusal, the contempt is one "in the immediate presence and view of the court," and no affidavit or evidence is requisite to the commitment. The appellate court before which the propriety of the commitment is brought either by *certiorari* or by *habeas corpus* is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right. The adjudication of the court in which the alleged contempt occurred, while conclusive with the party committing the act of which he was convicted, and of its character, when that according to the circumstances may be meritorious or otherwise, cannot establish as a contempt that which the law entitled the party to do. An order made in a proceeding to punish for criminal contempt may be reviewed by *certiorari*. The provisions of the Code of Criminal Procedure to the effect that judgments and orders in criminal cases and in "special proceedings of a criminal nature" may be reviewed only by appeal, does not include proceedings to punish for criminal contempt. The provisions of the constitution and statutes protect a person called as a witness in any judicial or other proceeding against himself or upon a trial against others, from being compelled to disclose facts and circumstances that can be used against him as tending to connect him with any criminal evidence which may then or thereafter be used or charged against him, or the sources from which evidence of the commission or his connection with it may be obtained. The witness is always the judge in such a case of what the effect of the answer sought to be drawn from him might be, and if to his mind it might constitute a link in the chain of evidence sufficient to convict him, if other facts are shown, he may remain silent, unless it is perfectly clear that he is mistaken and that the answer cannot injure him or subject him to the penalty of a prosecution. So held in proceedings to punish for contempt for a refusal to answer questions. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, reversing 77 Hun, 612. In *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, the power of the court to

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punish for contempt for disobedience of an injunction is discussed, and it is said upon the question as to whether a party is guilty of criminal contempt, that the question of jurisdiction does not involve an inquiry whether the case made by the complaint entitles the plaintiff to relief, but only whether the court had power to decide whether it entitled them to relief or not, and the rule is reiterated that an injunction granted in a case where the court has jurisdiction, though erroneously granted, is voidable only and not void, and until set aside must be obeyed. To warrant a punishment for contempt in violating a judgment or order of the court, the mandate alleged to have been violated should be clearly expressed, and not applied to the act complained of until a reasonable certainty is shown that it had been violated. *Ketchum v. Edwards*, 153 N. Y. 534. The rule is reiterated that an order of a court having jurisdiction must be implicitly obeyed, however erroneous it may be, and it is no defence when called upon to answer for disobedience that the order or judgment was erroneous or broader than the facts warranted, or has given relief beyond what was demanded and what the facts justified. The interest in maintaining respect for an order of the court forbids that litigants should be permitted, under a plea of hardship, real or imaginary, to set at naught the orders and decrees of the court however improvidently granted, if it even seems certain that the court granted them under misapprehension or mistake. *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, is cited, and also *Erie R. Co. v. Ramsay*, 45 N. Y. 637 ; *Koehler v. Farmers' Nat. Bk.* 117 N. Y. 661 ; *People v. Pendleton*, 64 N. Y. 622, distinguished in 7 App. Div. 43. An act which is not a civil or private contempt and which is not enumerated among the civil contempts under § 8 of the Code, is not a contempt, although it may be punishable as a misdemeanor. It was adjudged that a juror who went to the scene of the affray for the purpose of acquainting himself with the locality was not guilty of contempt. The distinction between private or civil contempt and public or criminal contempt is pointed out in *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N. Y. 245. Where a witness duly summoned to testify before a grand jury refuses to answer proper questions, the court has power to commit him to the county jail for contempt until he shall have answered such question, and such commitment is regular and lawful both under the common law and the statutes

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of the State. The justice and propriety of the commitment cannot be reviewed by *habeas corpus*. *People ex rel. Phelps v. Fancher*, 2 Hun, 226. To punish a party in failing to appear and be examined as a witness before trial, a copy of the order requiring him to appear must have been personally served upon him *Loop v. Gould*, 17 Hun, 585, citing *Tebo v. Baker*, 19 A. L. J. 398. The provisions of the Code prescribing the punishment to be inflicted upon one guilty of criminal contempt does not apply to proceedings to punish for civil contempt. *King v. Flinn*, 37 Hun, 329. On fining a party for contempt the court will adhere strictly to what is proven, taking nothing upon inference and giving him the benefit of every doubt and defect in the proof. *Van Valkenburgh v. Doolittle*, 4 Abb. N. C. 72. Punishment under the Code of Civil Procedure is a bar to a proceeding under § 143 of the Penal Code for punishment as for a misdemeanor. *People v. Meakim*, 44 St. Rep. 748.

The practice of the courts for punishment of criminal contempt is not regulated by statute except as prescribed by § 10 of the Code. The provisions of §§ 2266–2292 refer to the practice in cases of civil contempt and not to those enumerated under § 8, except as to the acts enumerated in § 8 which are also enumerated under § 14 of the Code of Civil Procedure, and have resulted in the rights or remedies of a party to a civil action or special proceeding being defeated, impaired, impeded or prejudiced thereby, where the offending party is sought to be punished, as for a civil or private contempt, upon the motion of the party injured. *People ex rel. Barnes v. Court of Sessions*, 82 Hun, 242. Reversed in 147 N. Y. 290, upon the ground that the final order entered in the proceeding failed to state the particular circumstances of the offence as required by § 11 of the Code of Civil Procedure so as to show whether or not the adjudication rested upon the only ground on which a criminal contempt can be based, viz.: objection to a gross and inaccurate report of the proceedings of the court. Opinion by Haight, J., contains a discussion as to the nature of adjudication in contempt proceedings.

The following are contempts by statute and seem, at least in the main, to be properly classed as criminal contempts. Section 2267 has already been referred to under the head of Civil Contempts as being practically applicable, if at all, to criminal contempts only.

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The provisions of § 853 are as follows :

§ 853. Penalty for disobedience.

A person so subpœnaed, who fails, without reasonable excuse, to obey the subpœna, or a person who fails, without reasonable excuse, to obey an order, duly served upon him, made by the court, or a judge, in an action, before or after final judgment therein, requiring him to attend and be examined, or so to attend, and bring with him a book or paper, is liable, in addition to punishment for contempt, for the damages sustained by the party aggrieved in consequence of the failure, and fifty dollars in addition thereto. Those sums may be recovered in one action, or in separate actions. If he is a party to the action in which he was subpœnaed, the court may, as an additional punishment, strike out his pleading.

Section 855 *et seq.* provides a method of punishment of persons subpœnaed where the subpœna is issued by a judge, arbitrator, etc.

Laws of 1860, chap. 39, §§ 1-3, provide for the punishment of a witness refusing to appear before a committee of the common council.

Under § 1444 of the Code a person committing waste may be punished as for contempt.

Under § 2709 a refusal to be sworn or answer a question in proceedings before a surrogate to discover property withheld is punishable as for contempt.

On an accounting in a general assignment for the benefit of creditors, the court has, under § 20, subdivision 8, power to punish as for contempt any disobedience or violation of an order made or process served under the provisions of the act. The court also has power on the application of either party to require a sheriff to return inventory in attachment proceedings, and disobedience to such order may be punished as for contempt. Code, § 681.

The court may also punish an omission to make a return required by writ of *certiorari* or by an order for further return as directed by § 2135.

In replevin proceedings, if the sheriff fails to comply with the provisions of § 1715, after proper notice given to him to show cause, he may be punished for disobedience as for contempt of court. Code, § 1716.

Under chap. 310 of Laws of 1886, § 9, the receiver of an insolvent corporation may require the clerk of a county in which suit is brought to issue subpœnas to compel the attendance of witnesses, and disobedience to such subpœnas is con-

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tempt and shall be punishable as other contempts are punishable.

Under § 3247 of the Code certain provisions are made for punishment for failure to pay costs as for contempt.

§ 1716. Return, etc., by sheriff; how compelled.

If the sheriff fails to comply with the last section, either party may require him so to do, within ten days after service of a notice to that effect, or to show cause, at a term of the court, designated in the notice, why he should not be punished for contempt of the court. The notice may be served at any time before final judgment, except that it cannot be served on the part of the defendant before answer. An omission to comply with such a notice is punishable as a contempt of the court.

§ 680. Punishable as crime and contempt.

A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

§ 681. Mitigation of punishment.

Where it appears, at the time of passing sentence on a person convicted, that he has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court passing sentence, may mitigate the punishment to be imposed in its discretion.

Under § 874 a person failing to obey an order to appear in proceedings to take a deposition to be used within the State is guilty of contempt if he fails to obey the subpœna. Like provisions are made under § 920 of the Code, and under § 635 of the Code of Criminal Procedure. Under §§ 807-8 of the Code provision is made for the punishment as for contempt for disobedience to an order granting a discovery of books, papers, etc. Under § 1773 payment of a sum of money directed to be paid by the husband as alimony may be enforced by proceedings as for contempt. Under § 1618 obedience to an order may be enforced by proceedings to punish as for contempt. Section 5 of chapter 213 of the Laws of 1887 provide for punishment as for a criminal contempt of a person who fails to appear, refuses to answer or to produce books, papers, etc., as provided for in that act. This act relates to examination by the governor of applications for clemency. Disobedience to a subpœna or refusal to be sworn or testify may be punished by the court or magistrate as for criminal contempt in the manner provided for in the Code of Civil Procedure, and Criminal Code, § 619. Subpœnas may be issued and disobedience thereto punished as for contempt. See § 952 of the Criminal Code. A violation of the provisions of § 242 of the Code of Criminal Procedure is,

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under § 243, punishable by the court as for a contempt. A person is not entitled to a writ of *habeas corpus* or a writ of *certiorari* where he is detained by an order made in a special proceeding except to punish him for contempt. Code, § 2016. Under the provisions of § 2032 the court or judge must, in proceedings on writ of *habeas corpus*, make a final order to remand the prisoner if it appears that he is not detained in custody by a final order of a competent tribunal made in a special proceeding except to punish for contempt. A violation of § 349 of the Penal Code, by making an application for an order to stay a trial before one judge that had been made before another is contempt of court. Section 350 of Code. Failure to attend as a juror in proceedings to have a person declared a lunatic is contempt under § 2330. Failure of a juror to attend on an adjourned day in a justices' court is contempt of court. Section 2993. Section 3001 *et seq.* provides for the punishment of witnesses in justices' court who refuse to be sworn or affirm. No person shall be imprisoned within the prison walls of any jail for a longer period of three months under an execution or any other mandate against the person to enforce the recovery of a sum of money less than five hundred dollar in amount or under a commitment upon a fine for contempt of court in the non-payment of alimony or counsel fees in a divorce case where the amount so to be paid is less than the sum of five hundred dollars; and where the amount in either of said cases is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months. * * * (Code, § 111.) Under § 351 the county court is not authorized to remit a fine imposed for actual contempt of court, as provided for in previous section. By the provisions of the County Law, § 92, "persons in custody on civil process or committed for contempt, or detained as witnesses, shall not be put or kept in the same room with persons kept for trial or examination upon a criminal charge or convicts under sentence." By the previous section each county jail must contain a sufficient number of rooms for the separate confinement of persons kept on civil process or for contempt. Under § 718 of the Code, where the court has directed the deposit or delivery as prescribed in the preceding section, and where a judgment directs a party to make a deposit or delivery or convey real property, failure to obey such direction is a contempt.

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§ 2870. Criminal contempt.

A justice of the peace has power to punish for a criminal contempt a person guilty of either of the following acts :

1. Disorderly, contemptuous, or insolent behavior towards him while engaged in the trial of an action, the rendering of a judgment, or any other judicial proceeding ; where such behavior directly tends to interrupt the proceedings, or to impair the respect due to his authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt his official proceedings.

3. Resistance wilfully offered in his presence to the execution of his lawful mandate.

He has not power to punish, for a criminal contempt, in any other case.

The sections following § 2870 provide for the manner in which such contempt proceedings shall be taken. Traffic in liquor after an injunction has been granted pursuant to § 29 of the Liquor Tax Law is contempt. Failure to make a return to a writ of mandamus may be punished as for a contempt. Code, § 2073. Under § 103 of the Code of Criminal Procedure, in case of riots, etc., the sheriff or other officer must certify to the court in which the process was issued the names of the persons who resist the process, and their aiders and abettors, so that they may be proceeded against as for contempt. An application for an order forbidden by §§ 776-777 is contempt under § 778. As to the provisions that refer to an order directing the payment of money by contempt, see § 779. Section 338 provides that the mandate of the city court can be executed only in the city of New York, except an order to show cause why a person should not be punished for contempt, which may be served by any person in any part of the State. Section 724 of the Penal Code provides that that Code shall not affect any power conferred by law upon any public body, tribunal, or officers to impose or inflict punishment for contempt. Failure on the part of an attorney whose name is subscribed to the pleading in which scandalous matter has been stricken out to pay costs of motion may be punished for contempt. Code Civ. Pro. § 545. The provisions of that article of the Code relative to the service of papers does not apply to service of a paper to bring a party into contempt. Section 802 of Code. Section 31 of the State Charities Law provides that obedience to the orders authorized by Article II. of the act shall be enforced in the same manner as obedience is enforced to the order or mandate of a court of record. Under § 2007 certain costs awarded by final order in special proceedings may be enforced by contempt

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proceedings. Obedience to certain order made under the Stock Corporation Law may be enforced by proceedings as for contempt. Section 51, Stock Corporation Law. Disobedience to an order made in supplementary proceedings may be punished as for contempt. Section 2457. Under § 2579 an appeal from a decree directing the commitment for disobedience of a direction of the surrogate or for refusal to testify or obey a subpœna does not stay the execution of the order or decree. Disobedience to a direction made by the surrogate under § 2602 with reference to the custody of money or other property of an estate as between co-executors or administrators is punishable as for a contempt. Under § 1018 a referee has power to punish a witness for contempt for non-attendance, refusal to be sworn and testify. Section 704 of the Code of Criminal Procedure contains provisions for the punishment of jurors failing to attend when duly summoned. Section 709 of the Criminal Code provides for the punishment of an officer not returning the jury list.

Order that Attachment Issue.

SUPREME COURT—OF KINGS COUNTY.

The People *ex rel.* William J. Gaynor,*agst.*John Y. McKane *et al.*

} 78 Hun, 155.

On reading and filing the summons herein, and by the complaint verified November 6, 1893, the affidavits herein of ——— and ———, verified ———, the injunction order herein granted by me, dated November 6, 1893, and the affidavits of ——— and ———, verified ———, and

It appearing therefrom that the defendants, John Y. McKane and (insert names of other defendants) were, and that each of them was, on the 7th day of November, 1893, at the town of Gravesend, duly served with the said injunction order, and with copies of the papers on which the said order was granted, and that the said defendants, ———, and each of them, did then and there wilfully disobey the said injunction order, a lawful mandate, and also then and there wilfully offer resistance to said injunction order, a lawful mandate.

Now, on the affidavits and papers above recited, and those referred to therein, on motion of Messrs. Johnson & Lamb, attorneys for the plaintiff, it is

Ordered, that an attachment, as for criminal contempt for wilful disobedience of the said injunction order, and for the resistance

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wilfully offered to said injunction order, issue to the sheriff of the county of Kings, against each and every of the said persons, to wit, (insert names of defendants), and that the said attachment be returnable at a Special Term of the Supreme Court, to be held at the county court-house, in the city of Brooklyn, on the 1st day of December, 1893, at 10 o'clock in the forenoon of that day. And it is further

Ordered, that each and every of the persons, to wit, (insert the names of defendants) be held to bail on said attachment in the sum of \$2,000 each.

J. F. BARNARD,

Enter in Kings County.

Justice Supreme Court.

Order of Attachment.

COURT OF OYER AND TERMINER—IN AND FOR THE CITY AND COUNTY OF NEW YORK.

In the Matter of
Harvey M. Munsell, etc.

} 101 N. Y. 245.

The People of the State of New York to the Sheriff of the City and County of New York, greeting:

We command you that you forthwith attach and take the body of Harvey M. Munsell before our justice of the Court of Oyer and Terminer, in and for the city and county of New York, now in session, for a contempt, to wit: In having been guilty of gross misconduct as a juror while duly impanelled and sworn as a juror in the case of *The People of the State of New York against Richard Short*, lately on trial for assault in the first degree, in the said Court of Oyer and Terminer, in and for the city and county of New York, as appears by the affidavits of ——— and ———, filed in the office of the clerk of this court, and that you bring the said Harvey M. Munsell before said court at the opening thereof, on Monday, the 11th day of May, 1885, to be dealt with according to law.

Witness, Hon. Charles H. Van Brunt, one of the justices of the Supreme Court of the State of New York, holding the said Court of Oyer and Terminer, this 8th day of May, 1893.

By the court.

JOHN SPARKS,

Clerk.

Attachment. (78 Hun, 155.)

The People of the State of New York to the Sheriff of Kings County, greeting:

We command you that you attach (insert defendants' names), and each and every one of them, so as to have their and each and every of their several bodies before our Supreme Court, at a Special Term thereof, to be held at the court-house, in the city of Brooklyn, on the 1st day of December, 1893, at 10 o'clock in the forenoon of said

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day, there to answer us as well touching the contempt which they and each of them, as alleged, have committed against us, as also such other matters as shall be laid to their and each of their charge. And further to perform and abide such order as our said court shall make in this behalf. And have you then and there this writ, and make and return a certificate under your hand of the manner in which you have executed the same.

Witness, Hon. Joseph H. Barnard, one of the justices of our said court, at the court-house, in the city of Poughkeepsie, on the 25th day of November, 1893.

STORM EMANS.

JOHNSON & LAMB,

Clerk.

Attorneys for Relator, WM. J. GAYNOR.

By the court.

JOHN COTTIER,

Allowed. J. F. BARNARD,

Clerk.

Justice Supreme Court.

Issued by special order of the court. Hold the defendants to bail in the sum of \$2,000 each.

J. F. BARNARD,

J. S. C.

Order for Relator to Serve Interrogatories.

At a Special Term of the Supreme Court, held at the court-house, in the city of Brooklyn, in the county of Kings, on the 9th day January, 1882 :

Present:—Hon Jasper W. Gilbert, *Justice*.

People *ex rel.* John D. Negus,

agst.

Richard S. Roberts, *et al.*

} 90 N. Y. 402.

Each of the seventeen last above-named persons being charged with a contempt of court in wilfully violating an order of injunction granted by Hon. Henry A. Moore, county judge of Kings County, on the 26th day of December, 1881, in a certain action then pending in the Supreme Court of the State of New York, county of Kings, wherein John D. Negus is plaintiff, and the city of Brooklyn, the Brooklyn Elevated Railroad Company, and others, are defendants, and a writ of attachment having been issued against each of the above-named seventeen persons for such contempt, directed to the sheriff of Kings County, and returnable this day, and said sheriff having made a return to said attachment that he had attached the said above-named seventeen persons, and each of them, and has taken bonds for the due appearance of them, and each of them, according to the exigency of said attachment.

Now, on filing said attachment and return, and the several bonds accompanying the same, and the said seventeen above-named persons, and each of them, now being by virtue of such attachment present before the court, and each severally denying that he is guilty of the misconduct alleged against him as aforesaid, and said Richard S. Roberts appearing by Ward & Jenks, his

Art. I. Criminal Contempts.

counsel, and the other persons appearing by Winchester Britton. their counsel, and after reading and filing the said attachment and the papers on which the same was granted :

Now, on motion of Herbert G. Hull, the attorney for the relator above named, and after hearing Ward & Jenks, of counsel for Richard S. Roberts, and Winchester Britton, counsel for the other persons, in opposition, and David Barnett and Erastus Cooke, of counsel for the relator, in support,

Ordered, that the relator above named forthwith file in the office of the clerk of this court interrogatories specifying the facts and circumstances alleged against the aforesaid seventeen persons, and each of them, and requiring their and each of their answers thereto. And it is further

Ordered, that seventeen above-named persons, and each and every of them, make written answers to said interrogatories, on their oath, within twenty-four hours after the service of said interrogatories on them or their counsel. It is further

Ordered, that further proceedings herein stand adjourned until the 11th day of January, 1882, at 10 o'clock in the forenoon, at a Special Term of this court, to be held at the court-house, in the city of Brooklyn, county of Kings, at which time and place it is hereby ordered and directed by this court that the said seventeen above-named persons, and each of them, attend this court and abide by the further order of this court.

Granted, January 9th, 1882.

CHARLES B. ELLIOTT,
Clerk.

Enter. J. W. G.

Filed January 9th, 1882.

Interrogatories.

SUPREME COURT—COUNTY OF KINGS.

People *ex rel.* John D. Negus,

agst.

Richard S. Roberts *et al.*

} 90 N. Y. 402.

Interrogatories to be administered to (insert names), and each of them touching a contempt alleged against them, and each of them for wilfully violating an injunction order granted by Hon. Henry A. Moore, County Judge of Kings County, on the 26th day of December, 1881, in a certain action then pending in the Supreme Court of the State of New York, Kings County, wherein John D. Negus was plaintiff, and the city of Brooklyn and the Brooklyn Elevated Company and others were defendants, which interrogatories are hereby exhibited pursuant to an order of this court dated January 9th, 1882.

First Interrogatory.—Were you from the 1st day of January, 1881, to and including the 31st day of December, 1881, one of the aldermen of the city of Brooklyn? If yea, in what ward in said city were you elected as such?

Art. I. Criminal Contempts.

Were you during the time above mentioned a member of the common council of the city of Brooklyn?

Second Interrogatory.—Were you served on the 27th day of December, 1881, at the city hall in the city of Brooklyn, and previous to a meeting of the common council on that day, with a copy of the summons and complaint, affidavits, undertaking, and injunction order to show cause in an action in the Supreme Court of the State of New York, county of Kings, wherein John D. Negus was plaintiff and the city of Brooklyn and others were defendants, a copy of which is hereby annexed marked "A. January 9, 1882"?

Was not such injunction and order to show caused served upon you by showing the original injunction and order to show cause in said action, bearing the signature, or purporting to bear the signature thereon, of Henry A. Moore, County Judge of Kings County, and at the time and place was there not delivered to and left with you personally a copy, or what purported to be a copy thereof, together with a printed copy of the summons and complaint in said action?

When was said service made?

Answer fully.

Third Interrogatory.—Was not the object of the adjournment of said meeting held December 27th, 1881, and after the service of the injunction order made by Hon. Henry A. Moore, County Judge of Kings County, to December 28th, 1881, for the purpose of passing or adopting the resolution which was the subject of the injunction order served on you?

Fourth Interrogatory.—Were not the adjournments had after the service of the injunction for the purpose of adopting the aforesaid resolution?

Fifth Interrogatory.—Did you attend a meeting or session of the common council of the city of Brooklyn on the 31st day of December, 1881? If yea, at what time was said meeting or session held?

Sixth Interrogatory.—Was a motion then made (if yea, by whom) to take from the table a communication from his honor, the mayor, presented December 9th, 1881, disapproving the resolution adopted in common council December 6th, 1881?

Was or was not such a communication a veto or disapproval by the mayor of the resolution named in the plaintiff's complaint in the action hereinbefore named?

If you answer nay, or say you do not know, or do not remember, then produce and annex to your answer to this interrogatory a copy of the resolution adopted December 6, 1881, to which said communication referred.

Seventh Interrogatory.—Was a motion then made to adopt the said resolutions notwithstanding the objection of his honor, the mayor? Who made such motion? Were the resolutions mentioned in the plaintiff's complaint and injunction order adopted by a two-thirds vote? Did you vote in the affirmative on said motion? Who else voted in the affirmative on said motion? How many persons so voted?

Eighth Interrogatory.—Was or was not a motion then made to re-

Art. 1. Criminal Contempts.

consider the vote just taken, and was or was not such motion lost? Did you vote in the negative on said motion to reconsider the vote taken on the adoption of said resolution? Who else voted in the negative?

HERBERT G. HULL,
Attorney for Relator.

Answer to Interrogatories.

SUPREME COURT—COUNTY OF KINGS.

The People *ex rel.* John D. Negus,

agst.

Richard S. Roberts *et al.*

} 90 N. Y. 402.

The defendants herein named, except Richard S. Roberts, severally claiming and protesting that the facts hereby declared by the answer to the interrogatories propounded to them under order of this court made and entered on the 9th day of January, 1882, constitute no contempt of court, each for himself answers said interrogatories as follows:

To the First Interrogatory.—I was on the first day of January, 1881, and to and including the 31st day of December, 1881, one of the aldermen of the city of Brooklyn; and I, the said (insert name), was elected as such in the ward, and (insert names and wards in which elected, etc.).

I was during the time mentioned in said interrogatory a member of the Common Council of the city of Brooklyn.

To the Second Interrogatory.—I was so served and in the manner specified in the second interrogatory.

To the Third Interrogatory.—It was not. When such adjournment was made on December 27th, 1881, I had formed no purpose upon the subject. I had not then determined how I should vote if such a resolution should be, at said adjourned meeting, put upon its passage. Nor did I know that it would be then put upon its passage.

To the Fourth Interrogatory.—Not to my knowledge.

To the Fifth Interrogatory.—I did attend said meeting, and it was held at 10 o'clock in the forenoon of said 31st day of December, 1881.

To the first paragraph of the Sixth Interrogatory.—There was a motion made to take from the table a communication from the mayor, disapproving of such a resolution, by William Dwyer.

To the second paragraph of said Sixth Interrogatory.—Such communication was a disapproval by the mayor of such resolution.

To the first paragraph of the Seventh Interrogatory.—There was a motion made to adopt said resolution by William Dwyer.

To the second paragraph of the Seventh.—Said resolution received a two-thirds vote, and I voted in the affirmative on its adoption, and each of the persons named herewith voted in the affirmative, seventeen in all.

To the Eighth Interrogatory.—Such motion was made and was lost.

Art. I. Criminal Contempts.

I voted in the negative on said motion, and each of the persons named as defendants herein so voted.

(Signed by the seventeen defendants.)

(Add verification by seventeen defendants).

Order Adjudging in Contempt.

At a Special Term of the Supreme Court held at the court-house in the city of Brooklyn, county of Kings, on the 15th day of December, 1893:

Present:—Hon. Joseph F. Barnard, *Justice*.

The People *ex rel.* William J. Gaynor,

agst.

John Y. McKane *et al.*

} 78 Hun, 155.

A writ of attachment having heretofore issued out of this court against the above John Y. McKane and others, charging him and them and each of them with a criminal contempt of court in wilfully disobeying an order of injunction granted by Hon. Joseph F. Barnard, a justice of the Supreme Court, on November 6th, 1893, in a certain action then pending in the Supreme Court of the State of New York, wherein William J. Gaynor was plaintiff and the said John Y. McKane and others defendants, and in wilfully having offered resistance to the said injunction order, which attachment was directed to the sheriff of the county of Kings, and the said sheriff having made a return to the said attachment that he had attached the body of the said John Y. McKane and had taken a bond for his due appearance according to the exigency of the said attachment, and the said John Y. McKane having appeared personally before said court,

Now, on the affidavits and other papers upon which the order for said attachment was made, to wit (insert names of papers), and on reading and filing the following affidavits in opposition thereto, to-wit: _____ and _____ and on reading and filing the following affidavits in rebuttal, viz. _____ and _____ and upon the examination of _____ and of _____ in open court, and after hearing _____ in support of said motion, and _____ in opposition thereto, and due deliberation having been had, it is, on motion of Messrs. Johnson & Lamb, attorneys for the relator, now here

Ordered, considered, and adjudged that the said John Y. McKane, has been and is guilty of the misconduct and contempt alleged against him, and has been and is guilty of the wilful disobedience to the lawful mandate of this court, to wit, wilfully violating the injunction order granted by Hon. Joseph F. Barnard, justice of the Supreme Court, on November 6th, 1893, in the aforesaid action; and has been and is guilty of resistance wilfully offered to the said lawful mandate of this court; and it is further

Ordered and adjudged, that the said John Y. McKane be im-

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prisoned in the common jail of the county of Kings for a period of thirty days. And it is further

Ordered and adjudged that a fine of \$250 be and the same is hereby imposed upon him for his said misconduct, and that he stand committed to the common jail of the said county of Kings there to remain charged upon said contempt until his said fine imposed as aforesaid shall be fully paid, not exceeding 30 days, unless he shall be sooner discharged by the further order of this court; and that a warrant issue to carry this order into effect, and that such fine be paid to the clerk of this court and be disposed of according to law.

Granted, December 15, 1893.

Enter.

J. F. BARNARD,
Justice Supreme Court.

JOHN COTTIER,
Clerk.

Order Adjudging Person in Contempt.

At a Court of Oyer and Terminer in and for the city and county of New York, at the county court-house, in said city, on the 31st day of March, 1890:

Present:—Hon. George C. Barrett, *Justice of the Supreme Court*, assigned to and holding said Court of Oyer and Terminer.

The People of the State of New York,

agst.

James A. Flack *et al.*, in the Matter of Contempt of Dilworth Choate.

56 Hun, 351,
121 N. Y. 678.

WHEREAS, on the 22d day of March, 1890, James A. Flack and his co-defendants were on trial at a Court of Oyer and Terminer, then being duly held in and for the city and county of New York at the county court-house, in the said city, for the crime of conspiracy, the Hon. George C. Barrett, justice of the Supreme Court of the State of New York, assigned to, and holding said Court of Oyer and Terminer, presiding; (insert statements of facts).

WHEREAS, on the 26th day of March, 1890, an order was made by this court that said Dilworth Choate show cause why he should not be punished for a criminal contempt of court, being in relation to his conduct in the premises; and the said order to show cause having come on to be heard on the 28th day of March, 1890, before said court, and the said Dilworth Choate having in open court acknowledged due personal service upon him of said order, and having appeared and been heard by counsel.

Now, therefore, on reading and filing the said order to show cause, and the application to this court by John R. Fellows, district attorney, and of ———, counsel for the defendants James A. Flack and others, and the affidavits of ———, each and all verified on the 25th day of March, 1890, in support of said order, and the affidavit of Dilworth Choate, verified on the 28th day of March, 1890; and after hearing Frederic W. Coudert, Esq., of counsel for said Dilworth

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Choate in his behalf, and John R. Fellows, district attorney, in aid of the court ; and after due consideration, it is

Ordered and adjudged by this court, that the said Dilworth Choate was, and is guilty of the criminal contempt of court in that he, being a newspaper reporter, surreptitiously and contemptuously secreted and concealed himself in the private room prepared for and in which the said jury on retirement were to hold their deliberations for the purpose, and with the intent of listening to, and taking notes of the conversation and deliberations of the said jury, and of publishing the same thereafter in one of the daily newspapers in the city of New York ; that after the entrance of the jury in said private room and while the doors and approaches thereto were guarded by the said officers of the court, and while the said jury were consulting and deliberating upon and in relation to their verdict, and during the sitting and while said court was in session, the said Dilworth Choate yet remained so secreted and concealed, and in furtherance of, and in execution of the purpose and intent aforesaid, listened to the conversation and deliberation of the jury, and made written notes thereof, and on being discovered by the said jury there with paper and pencil in hand taking notes, and being then and there charged by the members of the said jury with being a newspaper reporter, used the following expression, "We are everywhere," all of which disorderly and insolent behavior of said Dilworth Choate, was committed by him during the said day and while said court was in session and in its immediate view and presence, and directly tending to interfere with its proceedings, and to impair the respect due its authority ; and it is further

Ordered and adjudged, that for the said criminal contempt, said Dilworth Choate be fined the sum of \$250 and be imprisoned in close custody in the common jail of the county of New York for 30 days, and thereafter, in case of default in the payment of the aforesaid fine until said fine is fully paid, or a period of 30 days after the expiration of the period of 30 days above mentioned shall have expired.

Enter.

GEORGE E. BARRETT,

Justice Supreme Court.

Assigned to and holding the Court of Oyer and Terminer.

Order Convicting Respondents of Contempt.

At a Special Term of the Supreme Court, held at the court-house, in the city of Brooklyn, in the county of Kings, on the 14th day of January, 1882.:

Present :—Hon. Jasper W. Gilbert, *Justice.*

The People *ex rel.* John D. Negus,

agst.

William Dwyer *et al.*

} 90 N. Y. 402.

A writ of attachment having heretofore issued out of this court

Art. I. Criminal Contempts.

against the said above-named persons and others, charging him and them and each of them with a contempt of court, in wilfully violating an order of injunction granted by Hon. Henry A. Moore, county judge of King's County, on the 26th day of December, 1881, in a certain action then pending in the Supreme Court of the State of New York, county of Kings, wherein John D. Negus is plaintiff, and the City of Brooklyn and others are defendants, which attachment was directed to the sheriff of the county of Kings and returnable on the 9th day of January, 1882, and the said sheriff having made a return to the said attachment that he had attached the body of the said above-named William Dwyer, and has taken a bond for the due appearance of him according to the exigency of said attachment, and the said above named William Dwyer having appeared personally before the said court. And interrogatories specifying facts and circumstances alleged against him having, by order of the court, been filed, and a copy of the same having been served on his counsel pursuant to said order, and he having been required to answer said interrogatories, and having answered the same, and the respondent, Richard S. Roberts, being examined in open court, and after reading the affidavits of Theodore D. Dimon, (insert other affiants) and a copy of the minutes of the meeting of the common council held on December 31st, 1881, and after an examination of Robert Black in open court, and filing the testimony so taken of said Roberts and Black, and the proceedings having been duly adjourned to this day. And after hearing Erastus Cooke, David Barnett, and Hubert G. Hull, Esqs., in support of said motion, and Winchester Britton, Esq., and Ward & Jenks, counsel for respondents,

Now, on motion of H. G. Hull, attorney for relator, it is

No where considered and adjudged that the said William Dwyer has been and is guilty of the misconduct and contempt alleged against him, and has been and is guilty of the wilful disobedience to the lawful mandate of this court, to wit, in wilfully violating the injunction order granted by Hon. Henry A. Moore, county judge of Kings County, on the 26th day of December, 1881, in the aforesaid action. And it is further

Ordered and adjudged that the said William Dwyer for his said misconduct be imprisoned in the common jail of the county of Kings for a period of 30 days. And it is further

Ordered and adjudged that a fine of \$250 be and the same is hereby imposed upon him for his said misconduct, and that he stand committed to the common jail of the said county of Kings, there to remain charged upon said contempt until his said fine imposed as aforesaid shall be fully paid, not exceeding 30 days, unless he shall be sooner discharged by an order of the court, and that a warrant issue to carry this order into effect, and that such fine be paid to the clerk of this court to be disposed of according to law.

A copy.

CHAS. B. ELLIOT,

Clerk.

Art. I. Criminal Contempts.

Precedent for Order for Commitment.

At a Court of General Sessions of the Peace, holden in and for the city and county of New York, etc., April 30, 1861 :

Present :—John T. Hoffman, *Recorder*.

In the Matter of Andrew J. Hackley. }

The grand jury heretofore in due manner selected, drawn, summoned, and sworn to serve as grand jurors in the Court of General Sessions of the Peace in and for the city and county of New York, come into court and make complaint, by and through their foreman, theretofore duly appointed and sworn, that Andrew J. Hackley, after being duly summoned and sworn, as prescribed by law, as a witness in a certain matter and complaint pending before such grand jury, whereof they had cognizance, against certain aldermen and members of the common council of the city of New York for feloniously receiving a gift of money, under an agreement that their votes should be influenced thereby in a matter then pending before said aldermen and members of the common council in their official capacity, did then and there refuse to answer the following legal and proper interrogatory propounded to him, the said Andrew J. Hackley, to wit : “What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to \$50,000 ?”

And the said Andrew J. Hackley then and there, instead of answering the said interrogatory, stated as follows, to wit : “Any answer which I could give to that question would disgrace me, and would have a tendency to accuse me of a crime. I, therefore, demur to the question, referring to the ancient common-law rule, that no man is held to accuse himself, and to the sixth section of the first article of the constitution of this State.”

And the court having then and there decided that the said interrogatory is a legal and proper one, and that the reasons given for not answering the same are invalid and insufficient; and now ordering the said Andrew J. Hackley to answer the said interrogatory, and he, the said Andrew J. Hackley, still contumaciously and unlawfully refusing to answer the said interrogatory, the court doth hereby adjudge the said Andrew J. Hackley, by reason of the premises aforesaid, guilty of criminal contempt of court; and doth further order and adjudge that the said Andrew J. Hackley, for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the jail of the county of New York for the term of thirty days.

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Order for Commitment.

At a Court of Oyer and Terminer, held in and for the county of Thompson, at the court-house in the city of Ithaca, on the 22d day of March, 1894 :

Present :—Hon. Gerrit A. Forbes, *Justice of the Supreme Court.*

In the Matter of Frederick L. Taylor.

} 143 N. Y. 219.

The grand jury heretofore in due form selected, drawn, summoned and sworn to serve as grand jurors in the Court of Oyer and Terminer in and for the county of Tompkins, come into court and make complaint by and through their foreman herein duly appointed and sworn, and by and through J. H. Jennings, district attorney of said county of Tompkins, that Frederick L. Taylor, after being duly summoned and sworn as prescribed by law, as a witness in a certain matter and complaint pending before said grand jury, whereof they had cognizance against certain person or persons for unlawfully, feloniously causing the death of one Henrietta Jackson, said death having been produced by the use and administration of chlorine, or certain other foul, poisonous, noxious gases generated in two certain jugs, which said jugs were then and there before said grand jury duly procured, did then and there refuse to answer the following legal and proper interrogations propounded to him, the said Frederick L. Taylor, as follows, to wit :

(Insert questions which witness refused to answer.)

And the said Frederick L. Taylor then and there instead of answering the said interrogatories put to him as aforesaid stated and answered each of said interrogatories as follows, to-wit : “I throw myself upon my privilege.”

And the court having then and there decided that each and every of said interrogatories was a proper and legal one, and that the reason given by said Frederick L. Taylor in not answering the same was invalid and insufficient, and now ordering the said Frederick L. Taylor to answer the said interrogatories, and he, the said Frederick L. Taylor, still contumaciously and unlawfully refusing to answer the said interrogatories or any of them, the court doth hereby adjudge the said Frederick L. Taylor by reason of the premises aforesaid guilty of criminal contempt of court, and doth further order and adjudge that the said Frederick L. Taylor for the criminal contempt aforesaid, whereof he is convicted, be imprisoned by the sheriff of the county of Tompkins in the jail of said county of Tompkins until he be purged of his contempt, not exceeding thirty (30) days.

Witnessed and approved.

GERRIT A. FORBES,

Justice Supreme Court.

Attachment for Contempt. (56 Hun, 351, 121 N. Y. 678.)

The People of the State of New York to the Sheriff of the City and County of New York, greeting :

WHEREAS, On the 22d day of March, 1890, James A. Flack and his

 Art. 2. Legislative Contempts.

co-defendants were on trial at a Court of Oyer and Terminer then being duly held in and for the city and county of New York at the county court-house in said city for the crime of conspiracy, Hon. George C. Barrett, justice of the Supreme Court for the State of New York, assigned to and holding said Court of Oyer and Terminer, presiding. (Recite facts upon which contempt is based.)

All of which disorderly, contemptuous, and insolent behavior of the said Dilworth Choate was committed by him during the sitting of and while the said court was in session and in its immediate view and presence, and directly tended to interrupt its proceedings and to impair the respect due its authority, and it having been further ordered and adjudged that for the said criminal contempt of court said Dilworth Choate be fined \$250 and be imprisoned in close custody in the common jail of the county of New York for thirty days, and thereafter in case of default in the payment of the aforesaid fine until said fine be fully paid, or a period of thirty days after the expiration of the period of thirty days above mentioned shall have expired.

And therefor we command you that you take the body of the said Dilworth Choate and safely keep him in your close custody in the common jail of the county of New York for thirty days, and thereafter in case of default in the payment of the aforesaid fine until said fine be fully paid, or a period of thirty days after the expiration of the period of thirty days above mentioned shall have expired.

Witness, Hon. George C. Barrett, justice of the Supreme Court, assigned to and holding the Court of Oyer and Terminer for the city and county of New York at the county court-house in said city on the 31st day of March, 1890.

By the court.

JOHN SPARKS,
Clerk.

ARTICLE II.

LEGISLATIVE CONTEMPTS. Legislative Law, § 4.

The matter of legislative contempts, while not strictly within the scope of a work on special proceedings, seems germane to the subject, since the right of the legislature to punish for contempt very frequently comes before the courts for examination. In the examinations of questions of contempt, legislative as well as judicial, the practitioner will look for a collation of the authorities under the statute applicable to punishment therefor. The statute, therefore, with leading decisions on the subject here is given.

§ 4. Legislative law. Contempts of either house.

Each house may punish by imprisonment not extending beyond the same session of the legislature, as for a contempt, for the following offences only;

1. Arresting a member or officer of either house in violation of his privilege from arrest;
2. Disorderly conduct of its members, officers, or others in the immediate view and presence of the house, tending to interrupt its proceedings;

Art. 2. Legislative Contempts.

3. The publication of a false and malicious report of its proceedings, or of the conduct of a member in his legislative capacity ;

4. Giving or offering a bribe to a member, or attempting, by menace or other corrupt means, directly or indirectly, to influence a member in giving or withholding his vote, or in not attending meetings of the house of which he is a member ;

5. Neglect to attend or to be examined as a witness before the house, when duly required to give testimony in a legislative proceeding.

The matter of legislative contempts is very thoroughly considered and fully discussed in opinion of Rapallo, J., concurred in by the entire court, in *People ex rel. McDonald v. Keeler*, 99 N. Y. 480, where the question arose upon *habeas corpus* as to the power of the legislature to punish for contempt. It is said that the five enumerated offences are the only ones which either house is authorized to punish as contempts, and that they take the place of the numerous offences and acts which were treated by Parliament as contempts. Reference is made to *Kilbourn v. Thompson*, 103 U. S. 168, where the plaintiff had been convicted of contempt, and sentenced by the House of Representatives to imprisonment. There it was held that the right of the House of Representatives to punish a citizen for a contempt was derived solely from the Federal Constitution, and that such rights as were not conferred by that instrument, were reserved to the States respectively, or to the people, and that while the House had power to punish contempt by fine and imprisonment in certain cases, it had no general jurisdiction on the subject.

It is further held that throughout the Union the practice of legislative bodies, and in this State the statutes existing at the time the Constitution was adopted, afford strong arguments in favor of the recognition of the right of either House to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which the State legislature has authority to regulate and enforce by statute. *Kilbourn v. Thompson* is distinguished 99 N. Y. 476. That case is cited in *Re Chapman*, 166 U. S. 661, where it is held that the refusal to answer pertinent questions in the matter of inquiry within the jurisdiction of the senate constitutes a contempt of that body.

The general rule is further laid down that indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts. In *People ex rel. Sabold v. Webb*, 5 Supp. 855, 23 St. Rep. 324,

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it was held that the legislature of this State does not possess the common-law power to punish for contempt which is exercised by English Parliament; it has only such powers in that respect as are expressly conferred upon it. And where a committee was appointed to take evidence and report to the House "such recommendations as in its judgment the public interest may require, and for the purpose of remedial legislation," it was held that the knowledge acquired by the investigations could not be used for the purpose of legislation within the meaning of the statute relating to contempt, and that the legislature had no power to punish the witness for contempt in refusing to testify before the committee. The case of *People v. Sharp*, 107 N. Y. 427, considers very fully the subject of contempt of legislative committees, and holds that notwithstanding the vesting of the judicial power in the courts, certain powers, in their nature judicial, may be delegated to a committee, with power to take testimony, summon witnesses, and a refusal to appear and testify before such committee in obedience to a subpoena is a contempt.

CHAPTER XVI.

PROCEEDINGS TO COLLECT A FINE.

SECTIONS OF THE CODE AND WHERE FOUND IN THIS CHAPTER.

SEC.	ART. PAGE.
2293. Clerk to make schedule of fines imposed.....	I 674
2294. Warrant to be issued by him.....	I 674
2295. Id.; when delinquent resides in another county.....	I 674
2296. Execution of warrant.....	I 674
2297. Return thereof.....	I 675
2298. Proceedings if fine not collected.....	I 675
2299. Who to be included in schedule.....	I 675
2300. Liability of sheriff.....	I 675
2301. Application of this title.....	I 675

§ 2293. Clerk to make schedule of fines imposed.

Where a fine has been imposed by a court of record, upon a grand or trial juror, or upon any officer or other person without being accompanied with an order for the immediate commitment of the person so fined, until the fine is paid, the clerk of the court, immediately after the close of the term at which the fine was imposed, must prepare a schedule, containing, in separate columns, the following matters :

1. The name of each person fined.
2. His place of residence, where it appears, from the papers on file or before the court, to be within the county.
3. The amount of the fine imposed upon him.
4. The cause for which the fine was imposed.

The clerk must subjoin to the schedule a certificate, to the effect, that it contains a true abstract of the orders imposing fines, and must annex it to the warrant specified in the next section.

2 R. S. 484, §§ 22, 24 (2 Edm. 506); *Roseboom v. Van Vechten*, 5 Denio, 414.

§ 2294. Warrant to be issued by him.

The clerk must immediately issue a warrant, under the seal of the court, directed to the sheriff of the county, and commanding him to collect from each of the persons, named in the schedule annexed to the warrant, the sum therein set opposite that person's name; and to pay over the sum collected, to the treasurer of the county. The warrant is the process of the court, by which the fines were imposed.

Id. § 23.

§ 2295. Id.; when delinquent resides in another county.

If a delinquent resides in another county, a separate warrant, for the collection of the fine imposed upon him, with an appropriate schedule annexed thereto, must be issued, in like manner, to the sheriff of the county where he resides.

§ 2296. Execution of warrant.

The sheriff, to whom a warrant is issued, must collect each fine out of the personal property of the person fined, as prescribed in chapter thirteen of this act, for the collection, by levy upon and sale of personal property, of an execution issued out of a court of record; and he is entitled to like fees thereupon. If sufficient personal property of a delinquent cannot be found to pay the fine and the fees, the sheriff must

Art. I. Nature of Proceedings.

arrest the delinquent, and detain him in custody until he pays the same, as upon an execution against the person, issued in an action, out of the Supreme Court; and he is entitled to like fees thereupon.

2 R. S. 484, § 25.

§ 2297. [Am'd, 1895.] Return thereof.

The sheriff must return the warrant, with his proceeding thereupon, at the term of the court; or, where the fine was imposed, in any county except New York, by the Supreme Court, or the county court, at the term of the county court, held next after the expiration of sixty days from the receipt thereof. If he fails to do so, the district attorney must take the same proceedings to compel a return, as may be taken by a judgment creditor, where a sheriff omits to return an execution, issued out of the Supreme Court.

Id. § 26; L. 1895, ch. 946.

§ 2298. Proceedings if fine not collected.

Where it appears, by return, that a fine remains uncollected, and it does not appear that the sheriff has the delinquent in custody, the district attorney must, if he has good reason to believe that the sheriff might, with due diligence, have collected the fine, or arrested and detained the delinquent, commence an action against the sheriff, in the name of the people. Otherwise he must direct the clerk to issue a new warrant, or to include the fine in the schedule, annexed to the warrant, to be issued by him. A new warrant may, from time to time, be issued, or the fine may be included in the schedule annexed to a subsequent warrant until it is collected.

Id. § 27.

§ 2299. Who to be included in schedule.

Where the clerk issues a warrant, as prescribed in this title, he must include in the schedule thereto annexed, the name of each person who has been fined, prior to the issuing thereof, and whose fine remains then wholly or partly unpaid, and not remitted by the court.

Id. § 28.

§ 2300. Liability of sheriff.

An action may be maintained, in behalf of the people against a sheriff to whom a warrant is directed and delivered, as prescribed in this title, to recover damages for any omission of duty with respect to the same, in a case where a judgment creditor might maintain an action against a sheriff, to whom an execution issued out of the Supreme Court is directed and delivered. In such an action, the people are entitled to recover the same damages, which a judgment creditor would be entitled to recover, if the order imposing the fine was a judgment of the Supreme Court.

§ 2301. Application of this title.

This title does not apply to a case, where special provision for the collection of a fine is otherwise made by law.

This proceeding is a revision of 2 Revised Statutes (2 Edm. 506), with changes relative to procedure. No cases are cited under any of the statutes, nor are any decisions reported throwing light on the procedure. The principal changes consist in imposing the duties on the clerk of the court, which, under the statute, were required to be discharged by the district attorney.

Art. I. Precedent for Warrant.

In the county of Kings, by the terms of § 1156, special provision is made as to collection of fines of jurors.

Precedent for Warrant.

To the Sheriff of the County of Ulster, greeting :

WHEREAS, At a county court and court of sessions in and for the county of Ulster, held at the court-house in Kingston, on the 21st day of March, 1887, an order was duly made, imposing upon the persons named in the annexed schedule the fines opposite their names :

Now, therefore, you are commanded, in the name of the people of the State of New York, to collect from each of the persons named in the schedule attached to this warrant the sum set opposite that person's name, and to pay over the sum so collected to the county treasurer of the county of Ulster.

Witness, Hon. William S. Kenyon, county judge of Ulster
[L. s.] County, at the court-house in Kingston, on the 21st day of
March, 1887. J. D. WURTS,
(Attach schedule.) Clerk.

Schedule.

At a county court and court of sessions, held at the court-house in Kingston, in and for the county of Ulster, on the 21st day of March, 1887 :

Present :—Hon. William S. Kenyon, *County Judge*.

In the Matter of Fines Imposed upon certain Jurors.

At a term of this court, held as aforesaid, it appearing that the following-named jurors, duly summoned to attend thereat, failed to appear without excuse therefor, it is ordered that the persons named in the schedule below be fined the amount placed opposite their respective names and residences for such failure to attend :

NAME.	Residence.	Amount of Fine.	Cause of Fine.
Jacob C. Deyo	Woodstock	\$25	Non-attendance as juror.
Henry R. Miller.....	Shawangunk	25	Non-attendance as juror.
William C. Geldart.....	Marlboro.....	25	Non-attendance as juror.
John L. Brink.....	Saugerties.....	25	Non-attendance as juror.
Patrick Kearney.....	Kingston.....	25	Non-attendance as juror.

I, Jacob D. Wurts, clerk of the County Court and Court of Sessions, do, pursuant to the provisions of the Code of Civil Procedure, certify that the foregoing schedule contains a true statement of the fines imposed upon the above-named persons, at the above term, with their true places of residence and cause of said fine, and that the above order is a true abstract of the order imposing such fines.

Dated March 19, 1887.
[L. s.]

JACOB D. WURTS,
Clerk.

Art. 1. Form of Return.

By provisions of § 1089, subdivision 4, the certificate of fines imposed in the city of New York must be returned by the clerk to the commissioner of jurors.

Form of Return.

ULSTER COUNTY, ss. :

I, George Young, sheriff of Ulster County, do make and file my return to the within warrant. I certify that pursuant to the command of said warrant I have collected, by levy and sale of personal property, the fines therein ordered to be collected from Jacob C. Deyo, Henry R. Miller, and Patrick Kearney, and have paid the same, being the sum of \$75, to John Derrenbacher, county treasurer of Ulster County, and taken his receipt therefor.

That I have been unable to find sufficient personal property of William C. Geldart to satisfy the fine against him, or any part thereof, and I have arrested the said William C. Geldart, and now detain him in my custody as commanded by said warrant. I further certify that John L. Brink is not to be found in the county of Ulster, having removed therefrom to the State of Kansas, since the imposition of said fine.

GEORGE YOUNG,

Sheriff.

By GEORGE DUMOND,

Under Sheriff.

CHAPTER XVII.

PROCEEDINGS TO DISCOVER DEATH OF TENANT FOR LIFE.

SECTIONS OF THE CODE AND WHERE FOUND IN THIS CHAPTER.

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§ 2302. Petition for production of tenant for life.

A person entitled to claim real property, after the death of another who has a prior estate therein, may, not oftener than once in each calendar year, apply by petition to the Supreme Court, at a Special Term thereof, held within the judicial district, wherein the property, or a part thereof, is situated, for an order, directing the production of the tenant for life, as prescribed in this title by a person, named in the petition, against whom an action of ejectment to recover the real property can be maintained, if the tenant for life is dead, or, where there is no such person, by the guardian, husband, trustee, or other person, who has, or is entitled to, the custody of the person of the tenant for life, or in the care of his estate.

2 R. S. 343, § 1 (2 Edm. 354).

§ 2303. Contents of petition.

The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein set forth are true. It must contain:

1. A description of the real property, and a statement of the petitioner's interest therein, and of such other facts as show that the case is within the provisions of the last section.

2. An averment that the petitioner believes that the person, upon whose life the prior estate depends, is dead, together with a statement of the grounds upon which the petitioner's belief is founded.

Id. § 2 and part of § 3.

§ 2304. Service of petition and notice.

A copy of the petition, including the affidavit, together with notice of the time and

Art. I. Sections of the Code.

place at which the petition will be presented, must be personally served, at least fourteen days before its presentation, upon the person required, by the prayer thereof, to produce the tenant for life.

Remainder of § 3.

§ 2305. Proceedings upon presentation of petition.

Upon the presentation of the petition and affidavit, with due proof, by affidavit, of service of a copy thereof, and of the notice, if sufficient cause to the contrary is not shown by the adverse party, the court must either issue a commission, as prescribed in the following sections of this title; or make an order, directing the adverse party, at a time and place therein specified, before the court, or a referee therein designated, to produce the person upon whose life the prior estate depends, or, in default thereof, to prove that he is living.

R. S. 343, § 4.

§ 2306. Service of order; powers, etc., of referee.

Where an order, requiring the production of the tenant for life, or proof that he is living, is made as prescribed in the last section, a certified copy thereof must be served, at least fourteen days before the time therein specified, upon the person required to make the production of the proof, or upon his attorney. Upon presentation of proof of service, by affidavit, the court or the referee must, at the time and place specified in the order, or at the time and place to which the hearing may be adjourned, hear the allegations and proofs of the parties, respecting the identity of any person produced, with the person whose death is in question; or, if the latter person is not produced, respecting the reasons for the failure to produce him, and whether he is living. Where a referee is appointed, he has the same powers, and is entitled to the same compensation, as a referee appointed for the trial of an issue in an action.

Id. § 5.

§ 2307. Habeas corpus.

If it appears, by affidavit, to the satisfaction of the court, that the person required to be produced is imprisoned within the State, for any cause, except upon a sentence for a felony, or is kept or detained within the State, by any person, the court may, either before or after making the order for production, issue a writ of *habeas corpus* to bring him before it, or before the referee, as the case requires. The writ must be served and executed, and disobedience thereto may be punished, as where a writ of *habeas corpus* is issued, to inquire into the cause of the detention of a prisoner.

Id. § 7.

§ 2308. Report of referee.

The referee must deliver his report to the petitioner, or file it with the clerk, within ten days after the case is closed. He must state therein, whether any person was or was not produced before him, as being the person whose death is in question. He must append thereto, in the form of depositions, the proofs, if any, respecting the identity of any person so produced, with the person whose death is in question; or if no one is so produced, upon the question whether the latter person is living. He must also state, in his report, his conclusions upon the questions controverted before him.

Id. § 8.

§ 2309. Dismissal of petition when order complied with.

If it appears, to the satisfaction of the court, upon the referee's report, and the proofs thereto appended; or, where a referee is not appointed, upon the allegations and proofs of the parties before the court; that the party, required to produce the tenant for life, or to prove his existence, has fully complied with the order, the court must

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make an order dismissing the petition, and requiring the petitioner to pay the costs of the proceedings.

2 R. S. 343, § 9.

§ 2310. When life tenant deemed dead, and petitioner let into possession.

If it appears, from the referee's report, or upon the hearing before the court, that the person, upon whose life the prior estate depends, was not produced; and if the party required to produce him, or to prove his existence, has not proved, to the satisfaction of the court, that he is living; a final order must be made, declaring that he is presumed to be dead, for the purpose of the proceedings, and directing that the petitioner be forthwith let into possession of the real property, as if that person was actually dead.

Id. § 10.

§ 2311. Commission to be issued if life tenant is without the State.

If before or at the time of the presentation of the referee's report to the court, or, where a referee is not appointed, at any time before the final order is made, the party, upon whom the petition and notice are served, presents to the court presumptive proof, by affidavit that the person, whose death was in question, is, or lately was, at a place certain, without the State, the court must make an order, requiring the petitioner to take out a commission, directed to one or more persons, residing at or near that place, either designated in the order, or to be appointed upon a subsequent application for the commission for the purpose of obtaining a view of the person, whose death is in question, and of taking such testimony respecting his identity, as the parties produce. The order must also direct that the proceedings upon the petition be stayed, until the return of the commission; and that the petition be dismissed with costs, unless the petitioner takes out the commission within a time specified in the order, and diligently procures it to be executed and returned, at his own expense.

Id. § 11.

§ 2312. General provisions respecting the commission.

It is not necessary, unless the court specially so directs, that the witnesses to be examined should be named in the commission, or that interrogatories should be annexed thereto. The commission must be executed and returned, and the deposition taken must be filed and used, as prescribed for those purposes in article second of title third of chapter ninth of this act, except as otherwise specially prescribed in this title.

§ 2313. Petitioner to give notice of its execution.

The petitioner must give to the adverse party, or his attorney, written notice of the time when, and the place where the commissioner or commissioners will attend, for the purpose of executing the commission, as follows:

1. If the place, where the commission is to be executed, is within the United States, or the dominion of Canada, he must give at least two months' notice.
2. If it is within either of the West India islands, he must give at least three months' notice.
3. In every other case, he must give at least four months' time.

Notice may be given, as required by this section, by serving it as prescribed in this act for the service of a paper upon an attorney, in an action in the Supreme Court.

2 R. S. 343, § 12.

§ 2314. Execution thereof.

The commissioner or commissioners possess the same powers, and must proceed in

Art. I. Sections of the Code.

the same manner, as a referee, appointed by an order requiring the production of the tenant for life, or proof of his existence; except that they cannot proceed, unless a person is produced before them, as being the person whose death is in question. The return to the commission must expressly state whether any person was or was not so produced. The testimony, respecting the identity of a person so produced, must be taken, unless otherwise specially directed by the court, as prescribed in chapter ninth of this act, for taking the deposition of a witness upon oral interrogatories; except that it is not necessary to give any other notice of the time and place of examination, than that prescribed in the last section.

Id. part of § 13.

§ 2315. Proceedings on return of commission.

Upon the return of the commission, the proceedings are the same as upon the report of a referee, as prescribed in §§ 2309 and 2310 of this act; but the court may, in its discretion, receive additional proofs from either party.

Substituted for §§ 13, 14, 15, and 16.

§ 2316. Costs.

Where costs of a special proceeding, taken as prescribed in this title, are awarded, they must be fixed by the court at a gross sum, not exceeding fifty dollars, in addition to disbursements. Where provision is not specially made in this title for the award of costs, they must be denied, or awarded to or against either party, as justice requires.

Id. § 18.

§ 2317. Property; when restored.

The possession of real property, which has been awarded to the petitioner; as prescribed in this title, upon the presumption of the death of the person, upon whose life the prior estate depends, must be restored, by the order of the court, to the person evicted, or to his heirs or legal representatives, upon the petition of the latter, and proof, to the satisfaction of the court, that the person presumed to be dead is living. The proceedings upon such an application are the same, as prescribed in this title, upon the application of the person to whom possession is awarded.

Id. § 19.

§ 2318. Remedy of person evicted for profits, etc.

A person evicted, as prescribed in this title, may, if the presumption, upon which he is evicted, is erroneous, maintain an action against the person who has occupied the property, or his executor or administrator, to recover the rents and profits of the property, during the occupation, while the person upon whose life the prior estate depends, is or was living.

2 R. S. 343, § 20.

§ 2319. Order not conclusive in ejectment.

A final order, made as prescribed in this title, awarding to the petitioner the possession of real property, is presumptive evidence only, in an action of ejectment, brought against him by the person evicted, or in an action brought as prescribed in the last section, of the life or death of the person, upon whose life or death the prior estate depends.

This proceeding only applies in a case where the prior estate is held by one who is a life tenant proper in the legal and technical sense of the term. And therefore in a case where a testator left real property in fee-simple to a daughter, her heirs and

Art. I. Petition for Production of Life Tenant.

assigns forever, but upon the condition that should said daughter die without issue, that then the real property was given to a nephew; it was held that the death of the daughter could not be determined in this proceeding on the ground that the only question that could be determined was the question of the death of the life tenant, and that it did not appear that the daughter mentioned was a life tenant in the legal and technical sense of the term, but that the same depended upon a construction of the will which could not be had in this proceeding. *Matter of Hyde*, 41 Hun 73, 11 Civ. Pro. 155.

This is a substitute for the provisions of R. S. 343 (2 Edm. 354), with § 2319 added.

Petition for Production of Life Tenant.

SUPREME COURT, ULSTER COUNTY.

In the Matter of the Application of Joseph H. Freer, to discover the death of Alice W. Moon.

To the Supreme Court of the State of New York :

The petition of Joseph H. Freer, of the city of Albany, respectfully shows to the court that he is the owner in fee, and entitled to the possession, subject to the life estate of Alice W. Moon, of all that farm of land, lying and being in the town of Berne, in the county of Albany (insert description). That the same was demised to him by last will and testament of Henry Freer, the father of your petitioner, and then husband of said Alice W. Moon, subject to the life estate of said Alice W. Moon, by will, probated on the 10th day of June, 1868.

That your petitioner is informed and believes that said Alice W. Moon is dead; that as your petitioner is informed and believes she left the county of Albany in 1881, for the State of Iowa, and there resided for a time with a daughter. That she has not been heard from for three years last past, having left the said State of Iowa about that time.

That as your petitioner verily believes, her death is concealed by John Moon, her son, who resided and now resides on the property hereinbefore described, and claims the right of possession under said life tenant.

Wherefore your petitioner prays that an order be granted directing the production of said Alice W. Moon, by the said John Moon, at a time and place to be therein named, and for such other or further relief as to the court may seem just.

JOSEPH H. FREER.

(Add verification as to pleading.)

Art. I. Form for Notice, etc.

Form for Notice.

(Title as above.)

Please take notice, that the petition of Joseph H. Freer, a copy of which is hereto annexed, will be presented to the Supreme Court, at a Special Term, to be held at the city hall, in the city of Albany, on the 28th day of April, 1887, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and an application will be then and there made for the relief prayed for by said petition.

Dated April 10, 1887.

Yours, etc.,

JAS. W. BENTLEY,
Attorney for Petitioner.

To JOHN MOON.

Precedent for Order.

At a Special Term of the Supreme Court, etc.

(Title as above.)

On reading and filing the verified petition of Joseph H. Freer, by which it appears that he is the owner in fee of certain premises therein described, and that the said premises are subject to the life estate of Alice W. Moon, whom he believes to be dead, and on due proof of service hereof, together with the notice of presentation to the court at this term, more than fourteen days since : Now, after hearing James W. Bentley, Esq., for the application, and E. D. Ronan, Esq., opposed, it is ordered that the said John Moon produce the said Alice W. Moon, before Charles J. Buchanan, Esq., who is hereby appointed referee for that purpose, at the office, in the city of Albany, on the 15th day of May, 1887, at ten o'clock in the forenoon, or in default thereof to prove that the said Alice W. Moon is living.

S. L. MAYHAM,

Justice Supreme Court.

Precedent for Referee's Report.

(Title as above.)

To the Supreme Court of the State of New York :

The report of Charles J. Buchanan, sole referee appointed in this matter, shows to the court, pursuant to the order of this court heretofore made in this matter : I attended at my office at the time and place therein mentioned, and that James W. Bentley, Esq., appeared on behalf of petitioner, and E. D. Ronan, Esq., on behalf of John Moon. I further report that Alice W. Moon, the tenant for life of the property demised in the petition, also appeared before me at the same time and place, and her identity was admitted by petitioner's counsel. All which is respectfully submitted.

Dated May 15, 1887.

CHARLES J. BUCHANAN,
Referee.

The order dismissing the proceedings in case of report of compliance with former order will be the usual Special Term order. The allowance of costs is regulated by § 2316.

Art. I. Order on Return of Commission.

Order on Return of Commission.

At a Special Term of the Supreme Court, etc.

(Title.)

On reading and filing the return to the commission heretofore issued to Arthur C. Osborn, of Des Moines, Iowa, directing him to obtain a view of the person of Alice W. Moon, whose death is in question in this proceeding, and to take such proof as might be presented to him touching her identity, and having heard James W. Bentley, Esq., on behalf of the petitioner, and E. D. Ronan, Esq., opposed, and it appearing by said commission that said Alice W. Moon died on the 12th day of June, 1884 at the city of Des Moines, Iowa :

Now it is ordered that the said petitioner, Joseph H. Freer, be let into possession of the premises described in the petition, and John Moon is hereby ordered to so let the said Joseph H. Freer into possession thereof.

S. L. MAYHAM,

Justice Supreme Court.

CHAPTER XVIII.

PROCEEDINGS FOR THE APPOINTMENT OF A COMMITTEE OF THE PERSON AND OF THE PROPERTY OF A LU- NATIC, IDIOT, OR HABITUAL DRUNKARD. GENERAL POWERS AND DUTIES OF THE COMMITTEE.

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ARTICLE I.

 JURISDICTION OF SUPREME AND COUNTY COURT, AND HOW
 EXERCISED. §§ 2320, 2321, 2322.
§ 2320. [Am'd, 1895.] Jurisdiction; concurrent jurisdiction.

The jurisdiction of the Supreme Court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the Supreme Court, the jurisdiction of the court first exercising it, as prescribed in this title, is exclusive of that of the others, with respect to any matter within its jurisdiction, for which provision is made in this title. In all proceedings under this title for the appointment of a committee of such a person, he shall be designated "an alleged incompetent person;" and after the appointment of a committee of such person, in all subsequent proceedings the lunatic, idiot, habitual drunkard, or imbecile shall be designated "an incompetent person."

L. 1895, ch. 946.

§ 2321. Duty of court having jurisdiction.

The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts, and for the safekeeping and maintenance, and the education, when required, of the incompetent person and his family.

L. 1874, ch. 446, part of § 1.

§ 2322. Committee may be appointed.

The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual, or different individuals, in the discretion of the court.

The basis of this title is chapter 444, Laws of 1874, with additions by way of regulating the practice. Previous to the codification, the practice was uncertain, and must be sought for, as is said by the codifiers, in the adjudicated cases and books of practice, and constituted a voluminous and intricate system. They further say that they "have carefully endeavored to avoid inserting statutory restrictions upon the courts, tending to deprive

Art. 1. Jurisdiction of Supreme and County Court, and How Exercised.

them of any part of the large discretion now resting in them, which it is necessary to preserve for the benefit of the unfortunate individuals to whom this title applies." A change is made in the former procedure by authorizing a trial by jury at a trial term of the court instead of by a sheriff's jury.

The present statute is declaratory of the common law, and in terms confines the jurisdiction of the court to the cases of a person incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness. It was held in the *Matter of Brugh*, 61 Hun, 197, that the statute did not apply to cases of mere weakness of mind, or lack of business capacity. It should be noted, however, that this case arose in 1891, when this section of the Code limited the jurisdiction of the court to the three cases therein mentioned. The present section however, gives jurisdiction to the court in cases of imbecility, arising from old age, or loss of memory or understanding, or other cause. The English procedure with reference to a commission in lunacy is discussed somewhat in *Re Brown*, 1 Abb. Pr. 108-109, and is more fully considered in *Hughes v. Jones*, 116 N. Y. 67, where it is said that for nearly a century the English practice was followed. Vann, J., in that case, page 77: "The primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists so that the public, through the courts, can take control." The jurisdiction of the Supreme Court over lunatics and incompetent persons is stated as follows, in *Matter of Blewitt*, 131 N. Y. 546: "The jurisdiction which formerly was vested in the chancellor over the person and estates of lunatics is now exercised by the Supreme Court. But the Supreme Court exercises the power under the same rules as appertained to and regulated the jurisdiction of the chancellor, subject to such statutory provisions on the subject as are contained in the Code of Procedure. (Code, § 2320 *et seq.*) The power of the court to appoint a committee of the person and estate of a lunatic is very essential, but it should be exercised with scrupulous regard to the rights of the alleged lunatic and under the protection which attends other judicial proceedings affecting person or property, modified only so far as the peculiar nature of the inquiry and the condition of the alleged lunatic may render modification necessary." Although the Court of Common Pleas had jurisdiction over the person and

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property of a lunatic, such jurisdiction was concurrent with that of the Supreme Court, and although that jurisdiction was exclusive when so exercised (§ 2320), yet in regard to the disposition of the property of a lunatic in condemnation proceedings the Court of Common Pleas had no jurisdiction. *Matter of Board of Street Opening*, 89 Hun, 527, 69 St. Rep. 796. And further, although the Court of Common Pleas had jurisdiction in these proceedings, the committee of the estate of such lunatic, after the death of the lunatic, can be compelled to account to the lunatic's administrator in the Supreme Court, although said committee was appointed by the Court of Common Pleas. *Butler v. Jarvis*, 51 Hun, 248, 4 Supp. 137; see *contra*, dissenting opinion of Van Brunt, p. 276. In connection with § 2320 of the Code, see § 340 of the Code, subdivision 4, which also states the concurrent jurisdiction of the county court with that of the Supreme Court in matters relating to the custody of the person and care of the property of incompetents. The power of the court is limited by the provisions of the Code, and there is no express authority given to the court or the committee appointed by the court, to dispose of property of a lunatic. *Matter of Dunn*, 64 Hun, 20, 45 St. Rep. 830. See *Williams v. Empire Woolen Co.*, 7 App. Div. 348, for a discussion of the status of a lunatic in cases where he has not been declared a lunatic and no committee has been appointed. It seems that though the county court is not a court of equity, yet where, by virtue of §§ 340 and 3220 of the Code, it once acquires jurisdiction in proceedings for the appointment of a committee of a lunatic, that any equitable claim presented by the committee in asking for its discharge will be disposed of on equitable principles in order to save the expense and annoyance of further litigation. *Matter of Forkel*, 8 App. Div. 400. Where the original proceedings for the appointment of a committee were commenced in the county court, that court has, by virtue of this section, exclusive jurisdiction, and therefore is the only court having jurisdiction in any matters relating to the payment of debts of the lunatic. And where, in violation of this exclusive jurisdiction, an action is brought in the Supreme Court, the objection that the county court has exclusive jurisdiction may be taken for the first time on appeal. *Matter of Wing*, 83 Hun, 286, 64 St. Rep. 736, 31 Supp. 941. Where a committee has been appointed and a creditor of lunatic gets per-

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mission of court to bring action, and makes both committee and lunatic parties, the court should not restrain the action, for mental incapacity presents not interference with the enforcement of the lunatic's legal liability. *Kent v. West*, 16 App. Div. 499. The question as to the sanity of one who has been regularly committed should not be tried upon *habeas corpus* while proceedings for the appointment of a committee are pending which will determine the question with the aid of a jury. *Matter of Laurent*, 11 Abb. N. C. 120. For a learned and interesting review of the origin and history of lunacy proceedings, both in England and in this country, see opinion of Vann, J., in *Hughes v. Jones*, 116 N. Y., at page 74.

The history of legislation in this State and a review of the rights of lunatics and habitual drunkards, respectively, is given in *Matter of Janes*, 30 How. 446, and *Matter of Brown*, 1 Abb. 108. In the latter case, the Superior Court of the city of New York refused to issue the commission of lunacy on the ground of want of jurisdiction. However, by subdivision 8 of § 263 of the Code, the power is now expressly defined. The same jurisdiction is conferred on county courts by § 340, subdivision 4. See *Davis v. Spencer*, 24 N. Y. 386. The words "lunacy" and "lunatic" embrace every description of unsoundness of mind except idiocy. Section 3343, Code, sub. 15. In *Stewart's Executor v. Lispenard*, 26 Wend. 255, Coke, 1 Inst. 246, quoted by Blackstone, 1 Comm. 343, is cited, as to what constitutes lunacy, idiocy, and habitual drunkenness, to this effect: "*Non compos mentis* is the most legal term for all defects of the mind which the law notices. *Non compos mentis* is of four kinds:

"1. *Idiota*, which from his maturity by a perpetual infirmity is *non compos mentis*.

"2. He that by sickness, grief, or other accident wholly loses his memory and understanding.

"3. A lunatic that hath sometimes his understanding and sometimes not.

"4. Lastly, he that for a time depresseth himself by his own vicious act of his memory and understanding, as he that is drunken."

The opinion of Verplanck is referred to as a very exhaustive statement of the various definitions of lunacy and idiocy. A person may from old age become so weak and incapacitated as to

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justify the appointment of a commission. *Matter of Barker*, 2 Johns. Ch. 232. It is sufficient to justify a commission that a person is incapable of managing his own affairs, and this may arise from age, infirmity, or other misfortune. *Jackson v. King*, 4 Cow. 207; *Matter of Mason*, 1 Barb. 437. The finding that the party is of unsound mind and mentally incapable of governing himself or his affairs is sufficient; the word "lunatic" is not requisite. *Ex parte Rogers*, 9 Abb. N. C. 141. A recommendation of the jury that the party, from long confinement and its consequences, may require some temporary guardianship, does not impair the legal effect of the finding. *Ex parte Dickie*, 7 Abb. N. C. 417. The finding, however, of the jury must be that the party is of unsound mind, as every case of weakness or imbecility will not justify a commission, but the mind must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *Matter of Morgan*, 7 Paige, 236; *Matter of Mason*, 3 Edw. Ch. 380. It is, however, held in the late case, *Matter of Jackson*, 37 Hun. 306, citing earlier cases, and relying on *Delafield v. Parish*, 25 N. Y. 103; also citing *Riggs v. American Tract Society*, 84 id. 330, that a charge to the jury that to constitute a case of unsoundness of mind, which will justify the court in assuming the control of the person and property of the person by a committee, his mind must be so far impaired that if it had never been elevated above that state of capacity from his birth, it would have constituted a case of idiocy, was erroneous, as one may be wholly incompetent to manage himself and his affairs, and still be removed from a state of idiocy, and this is doubtless the present rule. See *Riggs v. American Tract Society*, 95 N. Y. 503.

Chancellor Walworth, in the *Matter of Tracy*, 1 Paige, 580, says with reference to what constitutes an habitual drunkard: "But very erroneous impressions seem to have gone abroad on this subject. It is supposed by many that the prosecutor in such cases is bound to prove affirmatively, that an habitual drunkard is incapable of managing his affairs; on the contrary, the fact that a person is for any considerable part of his time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties is *prima facie* evidence at least that he is incapacitated to have the control and management of his property." A man of weak mind, if not a lunatic or a fool, can contract. *Odell v. Buck*, 21

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Wend. 142. An epileptic of enfeebled mind was held competent to convey property. *Sprague v. Ducl*, Clarke Ch. 90, affirmed, 11 Paige, 480. A person of weak mind is liable for necessaries. *Skidmore v. Romaine*, 2 Bradf. 122. A person born deaf and dumb is not necessarily an idiot. *Brower v. Fisher*, 4 Johns. Ch. 441. Ever since the Revised Statutes, the court has had control of both the person and estate of habitual drunkards. *Matter of Lynch*, 5 Paige, 120. The appointment of a special guardian for a party as a lunatic, upon an allegation of a petitioner in a proceeding for another purpose, is a mere matter of routine and not adjudication of lunacy. *Estate of Spencer*, 5 Redf. 425. In *Matter of Heency*, 2 Barb. Ch. 326, it was held that the court of chancery had power to provide out of the surplus income of a lunatic for the support of persons not his next of kin, and whom the lunatic is under no legal obligations to support, where it satisfactorily appears to the chancellor, that the lunatic himself would have provided for the support of such persons had he been of sound mind. The committee of a lunatic may also be authorized to keep up the lunatic's family establishments as had been his custom previous to his lunacy, and to place at his disposal, so long as he is competent to judge of the claims of the applicants, small sums of money for the purposes of charity, as well as to expend a sum such as the lunatic was accustomed to do for the support of religious institutions. But the committee may not expend sums for charity or benevolent purposes other than had been the habit of the lunatic. The same rule is held in *Matter of Willoughby*, 11 Paige, 257, and that it is proper to allow provisions for the near relatives of the lunatic who are in need of such assistance, and a matter of course to make such provisions for his children. The court in all these matters acts for the lunatic, in reference to the lunatic, as it supposes he would have acted if he had been of sound mind. The court has the same power over habitual drunkards as over a lunatic. *Ex parte Lynch*, 5 Paige, 120. The court has no power to appoint a committee of a lunatic or to order a sale of his property before a commission has been issued and returned. *Ex parte Payn*, 8 How. 220. The petition for a commission of lunacy against a non-resident must show that he is the owner of property within the State. *Ex parte Fowler*, 2 Barb. Ch. 305. Where a lunatic has wandered from home to some place unknown, a commission could

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issue from the court of chancery. *Ex parte Ganse*, 9 Paige, 416. In the case of *The Parsee Merchant*, 11 Abb. (N. S.) 209, Judge Daly holds that the court has the right and it is its duty to do whatever is most conducive to the interests of the lunatic, to see that he is maintained as comfortably as his circumstances will allow, and that every effort is made to restore him to his health. The interests of the lunatic are the controlling considerations and not those of the expectant successors to his estate.

It has been held that the statement that a person is "of unsound mind and understanding and so far deprived of his reason and understanding as to be altogether unfit and unable to govern himself or manage his affairs," was a sufficient statement of incompetency to give jurisdiction to the county court. *Jackson v. Jackson*, 37 Hun, 308. Though § 2320 of the Code gives the courts power to declare a person incompetent to manage his affairs yet previous to such proceedings and to such declaration by the court, the lunatic is not prohibited from bringing an action, as his legal status is not changed until the court has interposed its jurisdiction and finally declared him to be of unsound mind. *Runberg v. Johnson*, 11 Civ. Pro. Rep. 283. The same rule is set forth in *Hanley v. Brennan*, 12 Civ. Pro. Rep. 151, where it is said that the court may appoint a guardian *ad litem* for a lunatic, although he has not been judicially declared insane in proceedings instituted for that purpose, and though no committee has been appointed. The court once having acquired jurisdiction by the institution of proceeding, still retains jurisdiction to direct the payment of costs of the proceedings out of the estate of the lunatic, although he has died pending the confirmation of the finding of the jury. *Matter of Lofthouse*, 3 App. Div. 142. An outline of the present jurisdiction of the court is stated by Ward, J., in the *Matter of Lofthouse*, 3 App. Div. 142, as follows: "The codifiers of this Code say, in referring to this title, that they have carefully endeavored to avoid inserting statutory restrictions upon the courts tending to deprive them of any part of the large discretion now resting in them which it is necessary to preserve for the benefit of the unfortunate individuals to whom this title applies. The care and custody of lunatics and persons of unsound mind was formerly vested in the chancellor, but by the Constitution of 1846 and the Judiciary Act supplementing it, this power became vested in the Supreme Court and in the county courts of

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the several counties as to persons residing in those counties concurrent with the Supreme Court, so that the original chancery jurisdiction vesting in this court upon the subject has not been circumscribed nor limited by the Code, the chapter referred to providing the procedure to be adopted in appointing the committee and defining its duties rather than defining the jurisdiction of the court over the person and property of the lunatic." Incompetency, under § 2320, does not include mere weakness of mind, nor lack of business capacity, still less want of business experience. Lunacy as defined in subdivision, § 3343, Code Civil Procedure (now § 7, Statutory Construction Law), embraces every description of unsoundness of mind except idiocy. *Matter of Brugh*, 61 Hun, 197. See this case for certain tests of recovery from insanity which were approved by the court. Though a belief in spiritualism may not be inconsistent with business capacity and judgment, yet where a person has become convinced in the reality of communications from the dead to a degree where the disposition of her property and her personal action is governed by the direction of deceased persons, and she is about so to dispose of her property, etc., a case is presented which calls for an investigation as to the competency of such person. *Matter of Beach*, 23 App. Div. 411. The test of the right to control property is not competency to manage a particular estate but mental health and consequent fitness for the management of the common and ordinary affairs of life. *Matter of Williams*, 24 App. Div. 251. The court originally acquiring jurisdiction in proceedings for the appointment of a committee of an incompetent has jurisdiction to determine the allowance to the committee for compensation, counsel fees, and expenses for the board and maintenance of the lunatic and costs of the proceedings. *Matter of Board of Street Opening*, 89 Hun, 527, 69 St. Rep. 796. Though the court acquiring jurisdiction is empowered by § 2321 to preserve the lunatic's property from waste and destruction, and provide for the payment of his debts and for the safekeeping and maintenance of himself and family, yet the committee is not empowered by this section to execute any instrument, in the case of a female lunatic, which would extinguish her inchoate right of dower. *Matter of Dunn*, 64 Hun, 78, 18 Supp. 723. Section 2321, empowering the court to provide for the payment of the debts of the lunatic out of the proceeds of his property, means the

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payment of his debts so far as his property will allow, and means a *pro rata* distribution in case the property is not sufficient to pay all debts in full—a general or specific lien being the only exception to this rule. *Matter of Wing*, 83 Hun, 285, 54 St. Rep. 736, 31 Supp. 941. Section 2321, providing for the payment of the debts of a lunatic, includes the payment of a debt owing to the committee and incurred previous to its appointment. The court says: "We fail to see why a debt incurred prior to the appointment of a committee, even though in favor of the person appointed, should not be treated with the same consideration as though it were one existing in favor of a stranger and had been incurred in the administration of the estate." Thus claims for advances made before his appointment by the committee for the support of the two minor children of the lunatic, were allowed him upon his accounting when he applied for discharge. *Matter of Forkell*, 8 App. Div. 401. The committee merely represents the courts in the exercise of its jurisdiction over the property of the incompetent person, and thus where the estate has been benefited by the collection of claims by an attorney employed to do so, the court will entertain an application by the attorney for payment and will order the committee to pay for such services from the funds. *Matter of Horton*, 18 Misc. 407. But the court has no further jurisdiction over the property of a person formerly incompetent after his committee has been discharged. It cannot compel restitution by persons to whom the former lunatic has subsequently transferred his property. *Matter of Dowd*, 19 Misc. 688. By subdivision 4 of § 340, Code Civil Procedure, the county courts have concurrent jurisdiction with the Supreme Court over the custody of the person and the care of the property of a resident of the county who is incompetent to manage his affairs, but by § 2320 the court, on exercising this jurisdiction, has exclusive jurisdiction with respect to any matter within its jurisdiction for which provision is made, therefore when the county court had first attained jurisdiction, the Supreme Court cannot make an order for the payment of the lunatic's debt. *People ex rel. Kenfield v. Lyon*, 64 St. Rep. 738. But as to the alienation of the lunatic's property in proceedings for that purpose the Code is to be strictly construed, and as no express power is given to divest a lunatic of her inchoate right of dower in her husband's property, such power is not given by implication.

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Matter of Dunn, 64 Hun, 20. This case is now only valuable as showing the strict construction given to the statute, as now by the amendment of 1893 an inchoate right of dower is expressly stated as being one of the interests in real property of a lunatic or incompetent person which may be alienated. The committee merely represents the court in the exercise of its power over the property of incompetents, and is subject to the order of the court with respect to the care, management, and disposition of such property. *Matter of Horton*, 18 Misc. 407. See Code Civil Procedure, § 2339; also, *Butler v. Jarvis*, 51 Hun, 248, 4 Supp. 137; *Runberg v. Johnson*, 11 Civ. Pro. 283.

ARTICLE II.

APPLICATION FOR COMMITTEE. §§ 2323, 2323a, 2323b, 2336a, 2324.

2323. [Am'd, 1895.] Application for committee; by whom made.

An application for the appointment of such a committee must be made by petition, which may be presented by any person. Except as provided in the next section, where the application is made to the Supreme Court, the petition must be presented at a Special Term held within the judicial district, or to a justice of said court within such judicial district at chambers where the person alleged to be incompetent resides or if he is not a resident of the State, or the place of his residence cannot be ascertained, where some of his property is situated, or the State institution is situated of which he is an inmate.

L. 1895, ch. 824.

§ 2323a. [Added, 1895; am'd, 1897.]

Where an incompetent person has been committed to a State institution in any manner provided by law and is an inmate thereof, the petition may be presented on behalf of the State by a State officer having special jurisdiction over the institution where the incompetent person is confined or the superintendent or acting superintendent of said institution; the petition must be in writing and verified by the affidavit of the petitioner or his attorney to the effect that the matters therein stated are true to the best of his information or belief; it must show that the person for whose person or property, or both, a committee is asked has been legally committed to a State institution over which the petitioner has special jurisdiction, or of which he is superintendent or acting superintendent, and is at the time an inmate thereof; it must also state the institution in which he is an inmate, the date of his admission, his last known place of residence, the name and residence of the husband or wife, if any, of such person, and if there be none, the name and residence of the next of kin of such person living in this State so far as known to the petitioner; the nature, extent, and income of his property, so far as the same is known to the petitioner, or can with reasonable diligence be ascertained by him. The petition may be presented to the Supreme Court at any Special Term thereof held either in the judicial district in which such incompetent person last resided, or in the district in which the State institution

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in which he is committed is situated, or to a justice of the Supreme Court at chambers within such judicial district. Notice of the presentation of such petition shall be personally given to such person, and also to the husband or wife, if any, or if none, to the next of kin named in the petition, and to the officer in charge of the institution in which such person is an inmate. Upon the presentation of such petition, and proof of the service of such notice, the court or justice may, if satisfied of the truth of the facts required to be stated in such petition, immediately appoint a committee of the person or property, or both, of such incompetent person, or may require any further proof which it or he may deem necessary before making such appointment.

L. 1895, ch. 824; L. 1897, ch. 149. In effect April 1, 1897.

§ 2323b. [Added, 1895.]

Upon the presentation of a petition and the appointment of a committee, as provided in section two thousand three hundred and twenty-three (a), the court or justice may award costs of the proceeding not exceeding twenty-five dollars, in addition to necessary disbursements, to the petitioner, payable from the estate of the incompetent person, and upon denial of an application to set the same aside, costs as of a motion.

L. 1895, ch. 824.

§ 2336a. [Added, 1895.]

Sections two thousand three hundred and twenty-five to two thousand three hundred and thirty-six, both inclusive, of this title shall not apply to applications for the appointment of a committee made by it on behalf of the State to secure reimbursement in whole or in part, for maintenance and support in a State institution.

L. 1895, ch. 824.

§ 2324.

Where the incompetent person has property which may be endangered in consequence of his incompetency, and no relative or other person applies for the appointment of a committee of his property, the overseer or superintendent of the poor of the town, district, county, or city in which he resides, or, where there is no such officer, the officer or officers performing corresponding functions under another official title must apply to the proper court for the appointment of such a committee. The expenses of conducting the proceedings thereupon must be audited and allowed in the same manner as other official expenses of those officers are audited and allowed.

2 R. S. 52, 53, §§ 2-7 (2 Edm. 53).

It is said in *Hughes v. Jones*, 116 N. Y. 74, "Any one, even a stranger, can petition for a commission to examine as to the sanity of another person within the jurisdiction of the court. While this is now provided by statute, it was also the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed lunatic."

ARTICLE III.

PETITION AND PROCEEDINGS THEREON. §§ 2325, 2326, 2327, 2328, 2334.

§ 2325. [Am'd, 1891.] Contents, etc., of petition; proceedings upon presentation thereof.

The petition must be in writing, and verified by the affidavit of the petitioner, or

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his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs, of the person alleged to be incompetent, as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him, and also the probable value of the property possessed and owned by the alleged incompetent person, and what property has been conveyed during said alleged incompetency and to whom, and its value and what consideration was paid for it, if any, or was agreed to be paid. The court must, unless sufficient reasons for dispensing therewith are set forth, in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more relatives of the person alleged to be incompetent, or to an officer specified in the last section. Where notice is required, it may be given in any manner, which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term, at which the petition might have been presented.

L. 1891, ch. 263.

§ 2326. [Am'd, 1898.] When foreign committee may be appointed.

Where the person alleged to be incompetent resides without the State, and a committee, curator, or guardian of his property, by whatever name such officer may be designated, has been duly appointed pursuant to the laws of any other State, territory, or country where he resides, the court may, in its discretion, make an order appointing the foreign committee, curator, or guardian, the committee of all or of a particular portion of the property of the incompetent person, within the State, on his giving such security for the discharge of his trust as the court thinks proper.

L. 1898, ch. 294. In effect Sept. 1, 1898.

§ 2327. [Am'd, 1895.] Order for commission, or for trial by jury in courts.

Unless an order is made, as prescribed in the last section, if it presumptively appears, to the satisfaction of the court, from the position and the proofs accompanying it, that the case is one of those specified in this title; and that a committee ought, in the exercise of a sound discretion, to be appointed; the court must make an order, directing, either

1. That a commission issue, as prescribed in the next section, to one or more fit persons, designated in the order; or

2. That the question of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury, at a trial term of the court.

3. When it satisfactorily appears from the petition and accompanying affidavits that any person or persons having acquired from the alleged incompetent person, real or personal property during the time of such alleged incompetency without adequate consideration, the court may issue an order, with or without security, restraining such person or persons from selling, assigning, disposing of, or incumbering said property, or confessing judgment which shall become a lien upon said property, during the pendency of the proceeding for the appointment of a committee, and said order may in the discretion of the court be continued for ten days after the appointment of such committee. Notice of the execution of the commission shall be given to the person or persons enjoined in such manner as the court may direct.

L. 1895, ch. 946.

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§ 2328. Contents of commission.

The commission must direct the commissioners to cause the sheriff of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

§ 2334. [Am'd, 1895.] Proceedings upon trial by jury in court.

Where an order is made, directing the trial by a jury, at a trial term, of the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried; which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order, direct that notice of the trial be given to such persons, and in such a manner as it deemed proper. The trial must be reviewed in the same manner, with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

L. 1895, ch. 946.

In proceedings instituted for the purpose of inquiring into the sanity of a citizen, the practice is to present to the court a verified petition, accompanied by affidavits alleging incompetency, by reason of unsoundness of mind to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate, and a commission thereupon issues. *Matter of Church*, 64 How. 393. A statute providing for an adjudication by which a person shall be confined in an inebriate asylum as an habitual drunkard is unconstitutional. *Matter of Jones*, 30 How. 446. It is within the power of the Supreme Court to appoint a guardian for an idiot or lunatic defendant upon application for that purpose, even though no inquisition has been found. *Hunter v. Hatfield*, 12 Hun, 381. It is not necessary to accompany the petition with the affidavit of a physician, to give the court power to appoint a commission, although in cases of lunacy it is usual to do so. *Matter of Zimmer*, 15 Hun, 214. But a committee cannot be appointed on the certificates of physicians; there must be an inquisition. *Matter of Corties*, 1 Law Bull. 59. The failure of the court to require notice of an application for the appointment of a committee for a lunatic to be given, where sufficient reasons for dispensing therewith are not set forth in the moving affidavit or

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the petition, does not deprive it of jurisdiction, but is a simple irregularity which may be cured or disregarded. It is sufficient, if, on a motion made by an alleged lunatic to set aside the order appointing the commission, all the parties interested have an opportunity to be heard. *Matter of Demelt*, 27 Hun, 480; *Matter of Rogers*, 9 Abb. N. C. 141. The alleged lunatic, except in case of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and he ought to be produced before the jury for their inspection and examination. *Ex parte Russell*, 1 Barb. Ch. 38; *Ex parte Tracy*, 1 Paige, 580. After the return of an inquisition finding sufficient facts, it is too late to question the allegations of the petition. *Ex parte Zimmer*, 15 Hun, 214.

As § 2325 requires notice of the presentation of the petition to be given to the husband or wife of the person proceeded against, or to one or more relatives of the person, etc., it was held, that where the sheriff's jury found a person an habitual drunkard, and a commission was issued, that all the proceedings except the filing of the first petition should be set aside where notice of the proceedings was not served, and where the person was not represented by counsel. Although her father and brother were notified to attend before the jury, the proceedings were set aside, with leave to the petitioner to make further application on the petition. *In re Bennett*, 5 Supp. 373. But it has been held that § 2325 does not require notice to be given to the relative of an alleged incompetent person when the application for the appointment of the committee is made by the husband or wife. *Matter of Parke*, 15 Misc. 662.

As a physician is prohibited by § 834, Code Civil Procedure, from disclosing professional information, he cannot make an affidavit in support of an application for the appointment of a committee of a lunatic or habitual drunkard. It seems that although the petition contains a positive allegation that the person is an habitual drunkard, this proof is not sufficient but further proof must appear by affidavit. It was held further that an affidavit showing intoxication upon one occasion affords no proof that a person is a habitual drunkard. *Matter of Hoag*, 20 Abb. N. C. 163. For a statement of the proceedings upon the presentation of the petition, see *Matter of Beach*, 23 App. Div. 412. A sheriff's jury or a jury at a trial term of the court are

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the proper tribunals to try questions of fact as to incompetency, and therefore it seems that where there is a question as to incompetency, the matter should not be decided upon affidavits but should be sent to the tribunals provided for by the law for that purpose to have the question of competency fully inquired into. *Matter of Beach*, 23 App. Div. 412. The committee of a lunatic, appointed abroad, has no authority over his property in this State. *Matter of Perkins*, 2 Johns. Ch. 124; *Matter of Petit*, 2 Paige, 174; *Matter of Ganse*, 9 id. 416; *Matter of Neally*, 26 How. 402; *Matter of Traznier*, 2 Redf. 171; *Weller v. Suggett*, 3 id. 249. In *Matter of Colah*, 6 Daly, 308, the court refused to turn over to the foreign committee of the lunatic who had become insane here and had been sent home, his estate here. The present section is new.

Precedent for Affidavit and Petition—Affidavit.

ULSTER COUNTY COURT.

In the Matter of Cornelia DuBois, a Supposed Idiot.	}
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ULSTER COUNTY, ss.:

Philip A. Ayers, Festus Stokes, and Daniel Coddington, each of the town of Marbletown, said county, being each duly sworn, doth each for himself depose and say, that he lives within a short distance of the house of Cornelia DuBois in said town, and has been acquainted with the said Cornelia since her childhood. That said Cornelia has always been of weak mind, and her mind appears to weaken as she advances in years. That she is now about thirty-two years of age, and is not capable of doing business or managing her affairs. That she cannot read or write, and is not capable of speaking intelligently or connectedly. That she has to be aided in dressing and undressing, and does not, unless aided, care for her person. That her condition is such that it affords no reasonable hope of her ever being any better.

PHILIP A. AYERS,
DANIEL CODDINGTON,
FESTUS STOKES.

Subscribed and sworn to be-)
fore me, April 2, 1887. }

THOMAS SNYDER,
Justice of the Peace.

Art. 3. Petition and Proceedings Thereon.

Petition Incompetent Person.

ULSTER COUNTY COURT.

In the Matter of Cornelia DuBois, a Supposed
Idiot.

To the County Court of Ulster County :

The petition of Hannah DuBois, of the town of Marbletown, said county, respectfully shows that your petitioner is the widow of John H. DuBois, who died intestate on or about the 24th day of October, 1886, and that your petitioner was duly appointed the administratrix of the estate of her said husband by the surrogate of the county of Ulster, on the 15th day of November, 1886. That Cornelia DuBois, the supposed idiot, is a sister of the deceased husband of this petitioner, and became of the age of thirty-two years on or about the 1st day of June, 1886. That since the death of the husband of this petitioner, the said Cornelia has lived and made her home with this petitioner. That prior to that time, and since about the year 1857, the said Cornelia has lived with and made her home in the family of the late husband of the petitioner. That said Cornelia has been and is a resident of the said town of Marbletown. That said Cornelia has been entirely unfit to have charge of, or manage her business affairs or property since her birth, and since about the year 1882, has been at times, and frequently, violent and dangerous to herself and those about her. That the said Cornelia DuBois is the owner of personal property, consisting of clothing of the value not to exceed the sum of about \$20. That the said Cornelia is the owner of certain real property of the value of about \$700, and which consists of the undivided one-third of the following property, being the farm in said town of Marbletown, lately belonging to Wessel L. DuBois, and purchased by him from Henry O. Lawrence, deed dated March 7, 1856, and recorded in the Ulster County clerk's office, in book of deeds No. 95, page 474, March 8, 1856, to which deed, or the record thereof, reference is hereby made for a full and particular description of said property ; said property containing in all some ninety-four acres, excepting, however, from the above, about half an acre from the ten-acre lot mentioned in said deed sold to Lewis DuBois.

That this petitioner with her infant children, the heirs at law of her late husband, are the owners of the other undivided two-thirds of said property, and occupy the whole thereof. That the said children of this petitioner are named, aged, and reside as follows :

Hulda DuBois, nineteen years, residing at Marbletown, said county.

Rachel DuBois, seventeen years, residing at Marbletown, said county.

Sabina DuBois, twelve years, residing at Marbletown, said county.

That the said Cornelia DuBois is a single person, has never been married, her father and mother are both dead, and her only heirs at law and next of kin are as follows :

 Art. 3. Petition and Proceedings Thereon.

The children of this petitioner being the heirs at law and the children of John H. DuBois, deceased, a brother of said Cornelia, and whose ages and places of residence are given above. Lewis DuBois, a brother of full age, residing in said town of Marbletown.

That said Cornelia DuBois has never had any committee appointed of her person or estate.

Wherefore your petitioner prays that a committee of the person and property of said Cornelia DuBois be appointed, and that a commission may issue out and under the seal of this court to inquire of the apparent idiocy of the said Cornelia DuBois.

HANNAH DuBOIS.

(Add verification as to pleading.)

Precedent for Petition in Case of Habitual Drunkard.

ULSTER COUNTY COURT.

In the Matter of David A. Abeel, a Supposed Habitual Drunkard.	}
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To the County Court of Ulster County :

The petition of Mary E. Abeel, of Medina, Orleans County, New York, respectfully shows : That she is the general guardian and maternal aunt of the children of David A. Abeel ; that her sister, the mother of said children, is dead, and said David A. Abeel has since remarried.

That the said David A. Abeel, who resides at the town of Saugerties, county of Ulster, now is, and for upwards of two years, as this petitioner learns from diligent inquiry and examination in the neighborhood where said David A. Abeel resides and has for several years resided, and from information obtained from relatives and friends of the family of said David A. Abeel, as well as from personal acquaintance and observation, an habitual drunkard, and by his habitual drunkenness is rendered incapable of managing his affairs, and in consequence thereof is wasting his property and liable to be defrauded thereof, if allowed to exercise control over it, all of which will more fully appear by the affidavits presented with the petition on this application. That the said David A. Abeel was bequeathed and devised, by his mother, lately deceased, personal and real property of considerable value.

That the personal estate to which he is entitled under the will of his said mother will be, as nearly as your petitioner can estimate, about the sum of \$10,000, and the real estate so devised, in the opinion of your petitioner, nearly or quite the same value, and is situate in the said town of Saugerties, in the county of Ulster, and in the adjoining town of Catskill, in the county of Greene.

That Margaret A. Abeel is the wife of said David A. Abeel, and resides with him. That his family consists of Francis Groat Abeel, Nelson Edward Abeel, Harriet H. Abeel, all infants, of whom your petitioner is general guardian, his only heirs and next of kin.

Art. 3. Petition and Proceedings Thereon.

Wherefore your petitioner prays that a committee of the property of the said David A. Abeel be appointed, and that a commission may issue out of and under the seal of this court, to inquire of the apparent habitual drunkenness of the said David A. Abeel.

Dated March 17, 1884.

(Signature.)

(Add verification as to pleading.)

Precedent for Affidavit.

In the Matter of David A. Abeel, a Supposed
Habitual Drunkard.

ULSTER COUNTY, ss. :

Frederick A. Morrey and Thomas N. Garrey, of the town of Saugerties, being each duly sworn, say, each for himself: That he is well acquainted with David A. Abeel and resides in the same neighborhood, and has known him for many years; that for a long period of time he has been in the habit of drinking to excess, and of going on sprees lasting for a considerable time, several days or weeks, absenting himself from home during the time, or a portion thereof, and spending money very freely; that within the past month, or thereabouts, he has, on two different occasions, indulged in prolonged sprees, frequenting hotels and taverns, and was, a short time since, as these deponents are informed and believe, ejected from a bar-room on account of intoxication; that while under the influence of liquor he is entirely incapable of caring for himself and liable to be imposed upon; that on one occasion shortly after his mother's death, one Martin Wheeler took for safekeeping from said Abeel the sum of \$100, which he afterward returned to him, said Abeel being unaware of what had become of the same; that he had at that time obtained some \$500 by sale or pledge of bank stock from his mother's estate; that by reason of such habitual drunkenness he is incapable of managing himself or his affairs, and is likely to waste his property and to be defrauded thereof by reason of his intoxication.

(*Jurat.*)

(Signatures.)

Notice to persons interested as required by § 2323a and § 2325 must not be overlooked.

Precedent for Order for Commission.

At a special term of the, etc.

(Title as above.)

On reading and filing the petition of Mary E. Abeel, and the affidavits of Frederick Lasher and Thomas Garrey, all verified on the 1st day of May, 1884, and proof of service thereof on David E. Abeel, the supposed habitual drunkard, and on Margaret A. Abeel, his wife, and the affidavits of David E. Abeel, Nelson Garrison, and

Art. 3. Petition and Proceedings Thereon.

Maria Garrison, in opposition to the application for an order for a commission :

Now, after hearing E. B. Walker, Esq., attorney for the petitioner, and John W. Searing, Esq., on behalf of said David E. Abeel, opposed, it is ordered that a commission, in the nature of a writ *de lunatico inquirendo*, be issued out of and under the seal of this court, in the usual form, directed to S. T. Hull, Esq., counsellor-at-law, Elbert H. Loughran, physician, and Amasa Humphrey, banker, all of the city of Kingston, in the county of Ulster, to inquire by a jury of said county whether the said David E. Abeel is an habitual drunkard, and incapable of managing his property, and that the sheriff of said county be instructed in said commission to summon a jury in the manner required by law.

It is further ordered that said commission be executed in the town of Saugerties, where the said David E. Abeel resides, and that previous notice of the time and place of such execution be given said David E. Abeel, to his wife, and to his counsel, John W. Searing, Esq., at least ten days before the date thereof.

It is further ordered that said David E. Abeel appear before said commission for examination before them.

SAMUEL EDWARDS,
Justice Supreme Court.

Precedent for Commission.

The People of the State of New York to CHARLES O. SAHLER, of the County of Ulster, greeting :

Know ye that we have assigned to you to inquire, by the oath of good and lawful men of the county of Ulster, by whom the truth of the matter may be better known, whether Cornelia DuBois, of the town of Marbletown, in the county of Ulster, is an idiot, with or without lucid intervals, by reason of which infirmity she is incapable of governing herself or of managing her affairs or property, or properly caring for her lands, tenements, goods, and chattels, and if so, from what time such infirmity dates, and in what manner and how such infirmity has manifested itself, and whether, while in such condition, the said Cornelia DuBois has alienated any lands and tenements, and if so to what person or persons, when, where, and after what manner ; and also what lands, tenements, goods, and chattels are yet remaining to her, and of what value the lands and tenements alienated by her are, as well as the value of the lands and tenements, goods and chattels by her maintained, and what the issues and profits thereof amount to by the year, and the value of all her real and personal estate, and who are the nearest heirs and next of kin of the said Cornelia DuBois, and who would be entitled to her estate in case of her death, and the age of each.

Wherefore we command you that you cause the sheriff of the county of Ulster to procure a jury, and that you inquire by the jury into the matters set forth in the petition in this proceeding, filed by Hannah DuBois, the 6th day of April, 1887, and also that you inquire into the value of the real estate and personal property of the

Art. 3. Petition and Proceedings Thereon.

said Cornelia DuBois, and the amount of her income therefrom, and the other matters above stated.

And that you appoint such day and place, or days and places, for the purpose of holding such inquisition as may be convenient ; and that you give reasonable notice of the time and place of the execution of this commission, to said Cornelia DuBois, Hannah DuBois, and Lewis DuBois, a brother of said Cornelia ; and that you report the inquisition which you shall thereupon make under the hands and seals of yourselves, or a majority of you, together with those of the persons by whom it shall be made, distinctly and plainly, and without delay to our court, together with this writ.

Witness, Hon. William S. Kenyon, county judge of Ulster [L. s.] County, at his chambers in the city of Kingston, said county, this 18th day of April, 1887.

WILLIAM S. KENYON,
Ulster County Judge.

V. B. VAN WAGONEN, JACOB D. WURTS,
Att'y for Petitioner, Kingston, N. Y. Clerk of said Court.

Order Where Trial is by Jury under Section 2327.

At a term of the Ulster County, etc.

In the Matter of Henrietta DuBois, a
Supposed Lunatic. }

On reading and filing the petition of Henry Ayers, and affidavits of Martin Johnson and Henry Bogardus, a physician, showing that Henrietta DuBois is a lunatic and incompetent to manage her affairs ; and due proof service thereof having been made on said lunatic, and on her father ; and after hearing D. W. Ostrander, Esq., for the application, and A. D. Lent, Esq., opposed, it is ordered that the question of fact arising upon the competency of said Henrietta DuBois be tried at a trial term of this court, pursuant to the provisions of § 2334 of the Code of Civil Procedure, and that the question of fact to be determined thereon is whether the said Henrietta DuBois, mentally, is capable of governing either herself or her affairs. It is further ordered, that the usual notice of trial be given in the usual manner to the said lunatic, to her father, Henry DuBois, and to her attorney, A. D. Lent, Esq.

WM. S. KENYON,
County Judge of Ulster County.

Questions of practice relating to regularity of proceedings upon execution of commission cannot be reviewed collaterally. *VanDeusen v. Sweet*, 51 N. Y. 378.

A motion on behalf of a lunatic for a new trial will be denied where, upon a consideration of the evidence and rulings, the court is satisfied that there is no doubt as to the lunacy of the alleged incompetent. *Matter of Williams*, 24 App. Div. 248. It is unusual that affidavits and proof on behalf of the person

Art. 4. Hearing Before Commissioners.

alleged to be incompetent, should be used in determining the question of such incompetency upon motion. Such question should be tried either before a sheriff's jury or before a jury at a trial term of the court. The court in this case says: "It is unnecessary nor would it be proper to determine that upon this record there is exhibited a case of incompetence such as would justify the appointment of a commissioner . . . but we think it the duty of the court, if it presumably appears from the petition and the proof accompanying it, that the person proceeded against is a person incompetent to manage himself or his affairs, to order an investigation as to whether or not such incompetency exists; and that this was a case which required an investigation before a tribunal provided by law for that purpose." *Matter of Beach*, 23 App. Div. 412.

ARTICLE IV.

HEARING BEFORE COMMISSIONERS. §§ 2329, 2330, 2331, 2332, 2333, 2335.

§ 2329. Commissioners to be sworn; vacancies, how filled.

Each commissioner, before entering upon the execution of his duties, must subscribe and take, before one of the officers specified in § 842 of this act, and file with the clerk, an oath, faithfully, honestly, and impartially to discharge the trust committed to him. If a commissioner becomes incompetent, or neglects or refuses to serve, or removes from the State, the court may remove him. The court may, from time to time, fill any vacancy created by death, removal, or resignation.

§ 2330. [Am'd, 1895.] Jury to be procured; proceedings thereupon.

The commissioners, or a majority of them, must immediately issue a precept to the sheriff designated in the commission, requiring him to notify not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners at a specified time and place within the county, to make inquiry as commanded by the commission. The sheriff must notify the jurors accordingly, and must return the precept and the names of the persons notified to the commissioners at the time and place specified in the precept. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt as where a juror, duly notified, fails to attend at a trial term of the court. The commissioners may require the sheriff to cause a talesman to attend in place of a juror notified and not attending, or who is excused or discharged; or they may adjourn the proceedings for the purpose of punishing the defaulting juror or compelling his attendance. But it is not necessary to cause any talesman to attend if at least twelve of the persons notified by the sheriff appear and are sworn.

L. 1895, ch. 946.

Art. 4. Hearing Before Commissioners.

§ 2331. Proceedings upon hearing.

All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them and issue a new precept to the sheriff to procure another jury.

§ 2332. Return of inquisition and commission.

The inquisition must be signed by the jurors concurring therein and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners and filed with the clerk.

§ 2333. Expenses of commission.

The commissioners are entitled to such compensation for their services as the court directs. The jurors are entitled to the same compensation as jurors upon the trial of an issue in an action in the same court. The petitioner must pay the compensation of the commissioners, sheriff, and jurors.

§ 2335. [Am'd, 1895.] Subject of inquiry in cases of lunacy.

Where the petitioner alleges that the person with respect to whom it prays for the appointment of a committee is incompetent by reason of lunacy, the inquiry with respect to his competency upon the execution of a commission, or the trial at a trial term, as prescribed in this title, must be confined to the question whether he is so incompetent at the time of the inquiry; and testimony respecting anything said or done by him, or his demeanor or state of mind more than two years before the hearing or trial, shall not be received as proof of lunacy, unless the court otherwise specially directs in the order granting the commission or directing the trial by jury.

L. 1874, ch. 446, § 2, am'd; L. 1895, ch. 946.

Oath of Commissioners.

(Title.)

ULSTER COUNTY, ss.:

Samuel T. Hull, Elbert H. Loughran, and Amasa Humphrey, being each duly sworn, says each for himself, that he will faithfully, honestly, and impartially discharge the duty of commissioner in the above-entitled matter under the order made herein by the Supreme Court.

(*Jurat.*)

(Signatures.)

Notice of Time and Place of Hearing.

To DAVID E. ABEEL, MARGARET A. ABEEL, *his wife*, and JOHN W. SEARING, Esq., *his attorney*:

Please take notice that a commission, heretofore issued, out of and by order of the Supreme Court, to inquire into the habitual drunkenness of David E. Abeel, will be executed at the hotel of Martin Man-

 Art. 4. Hearing Before Commissioners.

ning, in the town of Saugerties, in the county of Ulster, at ten o'clock in the forenoon of the 12th day of June next.

Dated May 10, 1887.

S. T. HULL,
E. H. LOUGHRAN,
AMASA HUMPHREY,
Committee.

Notice to Sheriff to Summon Jurors.

To the Sheriff of the County of Ulster, greeting:

WHEREAS, A commission has issued out of the Supreme Court to us, the undersigned, as commissioners to inquire as to whether David E. Abeel, of the town of Saugerties, in the county of Ulster, is an habitual drunkard: Now, therefore, by virtue of such commission, bearing date the 1st day of May, 1884, we require you to notify not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the Supreme Court, to appear before us, at the hotel of Martin Manning, in the town of Saugerties, on the 12th day of June, 1884, at ten o'clock in the forenoon, then and there to inquire on their oaths, of the habitual drunkenness of the said David E. Abeel, and of all such matters and things as shall be given in charge, by virtue of said commission; thereof, fail not at your peril.

Given under our hands and seals this 1st day of June, 1887.

(Signatures of commissioners.)

Indorsed by sheriff:—"The following-named jurors have been summoned to inquire into the matters set forth in the within precept, according to the tenor thereof."

The commissioners have no right to dictate to the sheriff what jurors shall be summoned. *Matter of Wager*, 6 Paige, 11. In proceedings for the appointment of committee for incompetent persons, the contesting parties upon a hearing before commissioners should be allowed to challenge jurors in accordance with the ordinary practice of obtaining an impartial jury; and a person ought not to be allowed to sit as a juror who states that he has formed an opinion relative to the inquiry, and that it would require some evidence to overcome it. *Matter of Klock*, 19 St. Rep. 309, 3 Supp. 479. In proceedings for an appointment of a committee for a lunatic, the supposed lunatic may appear and testify before a jury; so, too, the counsel for the lunatic may sum up before the jury and the jury may make recommendations in its verdict. *Matter of Dickie*, 7 Abb. N. C. 420. The jury should inspect the alleged lunatic when possible. *Matter of Russell*, 1 Barb. Ch. 38. And a refusal to permit counsel for lunatic to sum up is error and vitiates the proceedings. *Matter of Church*, 64 How. 393. All the jurors who are sworn and commence should

Art. 4. Hearing Before Commissioners.

sit during the entire proceeding. *Tebout's Case*, 9 Abb. 211. A majority of the commissioners appointed must decide every question arising upon the examination of the commission. The sheriff should not be present at deliberations of jury. *Matter of Arnhout*, 1 Paige, 497. The inquiry must be confined to the time when the inquisition is taken, unless otherwise provided in the order, and a finding that the incapacity has existed for a given period of time is illegal and improper, and will be stricken out on appeal. *Matter of Demelt*, 27 Hun, 480.

Form of Oath to Juror.

You do solemnly swear well and truly to inquire touching the idiocy of Cornelia DuBois, and of all such matters and things as shall be given to you in charge by virtue of a commission issued out of and under the seal of the county court, and now here to be executed and a true inquisition make, according to the evidence. So help you God.

In *Matter of Mason*, 1 Barb. 436, it is held that the form of the return to the inquisition is only important so far as to satisfy the conscience of the court. If enough appears upon the inquisition to enable the court to adjudge the party to be within one of the classes of persons over whom the statute has given it jurisdiction, it is sufficient.

Inquisition.

An inquisition taken at the hotel of John B. Krom, in the village of High Falls, in the county of Ulster, on the 14th day of May, 1887, before Charles O. Sahler, sole commissioner, appointed by virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of and under the seal of the court of Ulster County, and dated April 18, 1887, directed to the said commissioners, to inquire, among other things, of the idiocy of Cornelia DuBois, upon the oaths of Israel Snyder, John C. Sutton, Isaac Hasbrouck, Charles Hardenburgh, Simon R. Keator, William O. Church, Thomas Buckley, Richard S. Carney, Wessel B. Stokes, Thomas Snyder, Charles Rickert and Jacob L. Snyder, good and lawful men, who are indifferent persons qualified to serve and not exempt from serving as trial jurors in said county court, who, being summoned, duly sworn and charged, upon their oaths, say :

That the said Cornelia DuBois is an idiot, without lucid intervals, and by reason of such infirmity she is not capable of governing herself, or of managing her affairs or property, or properly taking care of her affairs, lands, tenements, goods, and chattels, and that such infirmity dates from about the year 1860, and that infirmity manifests itself in weakness of mind, neglect of her person, and at times in

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violent conduct. That so far as brought to the knowledge of this commission and jury, the said Cornelia DuBois has not aliened any lands or property. That the value of the personal property of the said Cornelia DuBois, consisting of her personal clothing, does not exceed the sum of \$20.

That the real property of the said Cornelia consists of an undivided one-third of a certain farm in said town of Marbletown, belonging to Wessel L. DuBois, in his lifetime, consisting of about ninety-two acres, which interest she inherited on the death of the said Wessel, and said interest is of the value of about \$650. That such interest in said real estate and personal property produces an income, and the rents, issues, and profits thereof is of the annual value of \$30.

That the said Cornelia DuBois is unmarried, and her heirs at law and next of kin, and the persons who would be entitled to her estate in case of her death are named, related, and aged as follows: (Here insert name of same, relationship, age, and interest in same.)

In testimony whereof, as well the said commissioner as the jurors aforesaid, have to this inquisition set their hands and seals the day and year first above written.

C. O. SAHLER, M. D.,
Sole Commissioner. [L. S.]

(All the jurors' signatures and their seals.)

An inquisition will be set aside as irregular where not signed by the jury. *Matter of Mason*, 51 Hun, 140. Jurors on an inquisition of insanity are entitled to only 25 cents as compensation and are not entitled to a per diem for each day served by them. *In re Sanford*, 15 Supp. 291. Section 2333 indicates clearly that the legislature intended that a juror should receive only the same compensation that a juror would be entitled to for serving as such in a court of record in a case in which he was impanelled; while the word "compensation" is used in § 2333, the word "fee" is used in § 3313. The provision of § 2333 is not that jurors are entitled to the same compensation as persons attending the same court to serve as jurors, but is limited to the same compensation as jurors upon the trial of an issue in an action in the same court; therefore the compensation of jurors in this proceeding are 25 cents each. *Matter of Sandford*, 61 Hun, 34, 39 St. Rep. 809. By § 2333 commissioners are entitled to such compensation as the court directs and jurors are entitled to the same fees as upon the trial of an issue in an action. The fees of the commissioners, the sheriff, and the jurors are a proper charge against the estate of a deceased lunatic, notwithstanding his death before the confirmation of the inquisition. *Matter of Lofthouse*, 3 App. Div. 139.

Prior to the enactment of § 2335 the jury were at liberty to

 Art. 5. Proceedings on Return of Commission.

inquire and return a statement of the intercedent period over which the lunacy had extended, but now the investigation is confined to the question of incompetency at the time of inquiry, and to permit an intelligent determination of this question, evidence is allowed to be given as to the demeanor and state of mind of the person for not more than two years prior to the hearing, unless the court shall otherwise specially direct. *Dominick v. Dominick*, 10 St. Rep. 33, 20 Abb. N. C. 287. An adjudication that lunacy existed more than two years prior to the date of the inquisition is unauthorized, and the adjudication must be limited to the fact as it exists at the time of inquiry. And thus an inquisition finding that lunacy existed previous to the date of inquisition will be modified by denying confirmation respecting the time prior to the inquisition, but such inquest may be confirmed in so far as it is legal. *In re Cook*, 6 Supp. 720. An order of confirmation will be reversed so far as it relates to the mental capacity of a lunatic prior to the date of the inquest, and the finding on that subject contained in the inquisition stricken out as unwarranted, but in other respects the order may be affirmed. *In re Sanford*, 8 Supp. 940.

ARTICLE V.

PROCEEDINGS ON RETURN OF COMMISSION. §§ 2336, 2337.

§ 2336. Proceedings upon verdict, or return of commission.

Upon the return of the commission, with the inquisition taken thereunder, or the rendering of the verdict of the jury, upon the question submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing, or make such a final order upon the petition as justice requires. Where a final order is made, dismissing a petition, the court may, in its discretion, award in the order a fixed sum as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the adverse party. Where a committee of the property is appointed, the court must direct the payment by him, out of the funds in his hands, of the necessary disbursements of the petitioner, and of such a sum, for his costs and counsel fees, as it thinks reasonable, and it may, in its discretion, direct the committee to pay a sum, not exceeding fifty dollars and disbursements, to the attorney for any adverse party.

§ 2337. [Am'd, 1887.] Security to be given by committee.

The provisions of article first of title seven, and section two thousand five hundred and ninety-five of article fifth of title second, chapter eighteenth of this act, respecting the security to be given by the guardian of the person or of the property of an infant, appointed by a surrogate's court, apply to a committee of the person or of the property, appointed as prescribed in this article. A committee of the property cannot enter upon the execution of his duties, until security is given, as prescribed by the

 Art. 5. Proceedings on Return of Commission.

court. A committee of the person cannot enter upon the execution of his duties, until security is given, if required by the court.

L. 1887, ch. 681; see §§ 2829, 2831.

The court is not restricted in its power to grant a new trial only to cases where a proper inquisition has been returned, and thus an inquisition will be set aside for irregularity or where the facts do not justify the finding of the jury. *Matter of Mason*, 51 Hun, 140, 4 Supp. 662. The court has power to grant a new trial, and an order directing such new trial, after a verdict in favor of the lunatic, will not be reversed on appeal when the evidence is conflicting. *In re Abby*, 6 Supp. 437. In a very clear case of mistake or prejudice of a jury, the court may discharge the inquisition on the mere examination of the supposed lunatic, in connection with the evidence produced before the jury, but it is improper to do so on *ex parte* affidavits, contradicting the finding, with no excuse for not having produced the deponents before the jury as witnesses. *Matter of Russell*, 1 Barb. Ch. 38. The finding and confirmation of an inquisition should not be set aside for mere irregularity where there is no room whatever for doubt of the lunacy. *Matter of Rogers*, 9 Abb. N. C. 141; *Matter of Lamoree*, 32 Barb. 122. Nor for insufficiency in the allegations of the petition. *Matter of Zimmer*, 15 Hun, 214. The defendant is entitled to a new hearing if it appears that the finding against him was induced by any bias or previously formed opinion. *Tebout's Case*, 9 Abb. 211.

The court has power in its discretion to direct a new commission where from the evidence or otherwise there is doubt that the jury erred in finding that the party was not of unsound mind. *Matter of Lasher*, 2 Barb. Ch. 97. An application to confirm or set aside an inquisition of lunacy is addressed very much to the discretion of the court and brings the case before it on the merits. *Matter of Rogers*, 9 Abb. N. C. 141. On petition to supersede the committee of a lunatic on the ground that the alleged lunatic is restored to his right mind, evidence tending to show that the inquisition was procured by fraud will not be received in the absence of such allegations in the petition. *Matter of Zimmer*, 15 Hun, 214. In *Matter of Cooper*, 5 Law Bull. 38, a verdict was set aside as against weight of evidence and trial ordered at circuit on issues framed. An application to set aside the proceedings of a sheriff's jury should be denied, even though

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§ 2330 has not been complied with, if the commission and inquisition have been filed with the clerk pursuant to § 2332. *Matter of Gill*, Abbot's Annual, 1884, page 180.

The custody of a lunatic's person and estate may be committed to the next of kin, instead of the heir; the presumption is in favor of kinder treatment from a daughter to a mother than from any other relatives. *Matter of Livingston*, 1 Johns. Ch. 436. The guardianship of a lunatic's estate is not as a matter of course to be committed to those presumptively entitled to it on his death, but they will be appointed where they appear to be the persons most likely to protect it. *Matter of Taylor*, 9 Paige, 611. If the next of kin unite in a petition and name the proper person or consent in writing, such person is usually selected. But if they do not so petition or consent there should be an order of reference and notice to the next of kin; it is irregular to appoint a stranger without notice. *Matter of Lamorce*, 19 How. 375, 32 Barb. 122. But on the other hand it is held that the appointment of a stranger as committee of a lunatic or idiot without notifying those who will succeed such idiot as heir is not irregular, and will not be set aside on their motion. *Matter of Owens*, 47 How. 150; *Pickersgill v. Reed*, 5 Hun, 170. It was said in *Matter of Paige*, 7 Daly, 155, limiting 5 id. 288, that there is no rule of law excluding the heirs and next of kin of a lunatic from appointment as committee of his person and property; though the court will exercise care and circumspection in appointing those who might be benefited by the lunatic's death, there is no absolute preference as a rule of law between them and strangers. The keeper of an asylum will not be appointed committee of a lunatic. *Matter of O'Connell*, 5 Law Bull. 60. Trust companies may be appointed committee of idiots, lunatics, and habitual drunkards. Chap. 485, Laws of 1885.

Precedent for Petition for Appointment of Committee by Next of Kin.

SUPREME COURT—COLUMBIA COUNTY.

In the Matter of Henry G. Hoornbeck, a
Lunatic.

To the Supreme Court of the State of New York :

The petition of Melissa Hoornbeck, Sarah Hoornbeck, William L.

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Hoornbeck, and Martin Hoornbeck respectfully shows to the court that heretofore, and on the 5th day of June, 1887, Henry G. Hoornbeck was declared a lunatic, and incapable of attending to his business and affairs by a commission appointed by this court on determination of a jury. That a committee is about to be appointed of the person and estate of said lunatic, and your petitioners are his only next of kin, being his sisters and brothers, his parents being dead, and he being unmarried. That your petitioners believe Amos Ward, of the city of Hudson, to be a proper person to be appointed such committee, both of the person and estate of said lunatic, and, therefore, pray the court that upon the filing the security required by law and directed by this court, the said Amos Ward be appointed committee of the person and estate of said Henry G. Hoornbeck, with the usual powers incident thereto.

A. B. GARDENIER,
Attorney for Petitioners,
Hudson, N. Y.

(Add verification.)

MELISSA HOORNBECK,
 SARAH HOORNBECK,
 WILLIAM L. HOORNBECK,
 MARTIN HOORNBECK.

The granting or refusing of costs rests in the sound discretion of the court, and will not be granted against the estate of the lunatic, unless the proceedings were instituted for his benefit and prosecuted fairly and in good faith. *Matter of Beckwith*, 3 Hun, 443. In that case, where an attorney had taken proceedings to set aside a commission without consulting the lunatic or his family, he was charged with costs. The petitioner is not ordered to pay costs, as, of course, on failure, but will be excused if the petition was in good faith and on probable grounds. *Brower v. Fisher*, 4 Johns. Ch. 411; *Matter of McAdams*, 14 Hun, 492. And where one jury found the party of unsound mind, good faith is presumed. *Matter of Giles*, 11 Paige, 338. The committee in such case will be allowed legal and proper expenses, and counsel fees out of the estate. *Matter of Clapp*, 20 How. 385. A solicitor who unsuccessfully opposes a commission cannot claim costs against the estate, though the court may allow them in its discretion. *Matter of Conklin*, 8 Paige, 450. The allowance of costs to pay expenses of proceedings on appointment of a committee is in discretion of the court. *Matter of Folger*, 4 Johns. Ch. 170; *Matter of Tracy*, 1 Paige, 583; *Matter of Russell*, 1 Barb. Ch. 39. Where the issue is awarded for the benefit of a third party, for the purpose of sustaining a conveyance from the lunatic, he was ordered to pay costs. *Matter of Van Cott*, 1 Paige, 489; *Matter of Folger*, 4 Johns. Ch. 169. If the wife of a lunatic, without prob-

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able cause, applies for the removal of a committee, costs may be allowed to the committee and denied to her. *Matter of Lytle*, 3 Paige, 251. By rule 72 of 1883 the court may allow the commissioners a compensation not to exceed \$10 for each day for each commissioner, and the court may direct the payment of costs and expenses up to \$250, exclusive of witnesses' fees, but in excess of that the order must be on notice to all parties who have appeared in the proceedings.

The court has power, even after the death of the supposed lunatic before confirmation of the inquisition, to charge his estate with costs by virtue of § 2336. *Matter of Lofthouse*, 3 App. Div. 141. The obligation of the sureties on the bond of a committee of an incompetent is for any failure on the part of the principal to account for and pay over moneys which may legally come into his hands as such committee; therefore it was held that the sureties are not responsible for the committee's neglect to pay over proceeds of the lunatic's interest in real estate which such committee had assumed to sell without applying to the court for permission to do so; this on the ground that the committee received the money wrongfully. *Johnson v. Ayers*, 18 App. Div. 497.

Matter of Connell, 5 Law Bull. 60, raises the question whether the bond can be dispensed with. The Supreme Court may grant relief to the sureties of a committee, and require new security under chapter 654, Laws 1881, while by chapter 425, Laws 1885, a trust company may be appointed committee with or without giving security.

Bond of Committee.

Know all men by these presents, That we, Thomas Snyder, Philip A. Ayers, and Jacob L. Snyder, of the town of Marbletown, in the county of Ulster, are held and firmly bound unto Cornelia DuBois, of the town of Marbletown, in the county of Ulster, an idiot, in the sum of \$800, lawful money of the United States, to be paid to said idiot, her executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals.

Dated 23d day of June, 1887.

The condition of this obligation is such that if the above-bounden Thomas Snyder shall and will, faithfully in all things, discharge the trust reposed in him, as the committee of the person and estate of Cornelia Du Bois, and obey all lawful directions of any court or officer of competent jurisdiction touching the trust, and that he will in all

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respects render a just and true account of all moneys and other property received by him, and of the application thereof, and of his guardianship whenever he is required so to do by a court of competent jurisdiction, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered }
in presence of }

JOHN BRODHEAD.

(Add justification and acknowledgment.)

THOMAS SNYDER,
PHILIP A. AYERS,
JACOB L. SNYDER.

The order appointing committees may be in the usual form of orders in the court having jurisdiction, and no precedent seems to be required.

ARTICLE VI.

POWERS AND DUTIES OF COMMITTEE. §§ 2338-2344.

§ 2338. [Am'd, 1895.] Compensation of committee.

A committee of the property is entitled to the same compensation as an executor or administrator. But in a special case, where his services exceed those of an executor or administrator, the Supreme Court or a county court within the county may allow him such an additional compensation for such additional services, as it deems just. The compensation of a committee of the person must be fixed by the court, and paid by the committee of the property, if any, out of the funds in his hands. The additional compensation authorized by this section may be allowed to the committee upon any judicial settlement made by him, and shall be for such additional services up to and including such settlement.

See L. 1890, ch. 516; L. 1895, ch. 946.

§ 2339. Committee under control of court; limitation of powers.

A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal, or resignation may be filled by the court. But a committee of the property cannot alien, mortgage, or otherwise dispose of, real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter.

§ 2340. Committee of property may maintain actions, etc.

A committee of the property, appointed as prescribed in this title, may maintain, in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he is appointed, might have maintained, if the appointment had not been made.

Part of § 5 of act of 1874, am'd; see § 429; § 426, sub. 2; §§ 427-428, 1755.

§ 2341. [Am'd, 1894.] Id.; to file inventory and account.

The provisions of article two of title seven of chapter eighteen of this act, requiring the general guardian of an infant's property, appointed by a surrogate's court, to file in the month of January in each year an inventory, account, and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property

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appointed, as prescribed in this title. For the purpose of making that application the committee is deemed a general guardian of the property ; the person with respect to whom he is appointed, is deemed a ward and the papers must be filed in the office of the clerk of the court by which the committee was appointed, or if he was appointed by the Supreme Court, in the clerk's office where the order appointing him is entered. In every case where a committee has used or employed the services of an incompetent person, with respect to whom he has been appointed a committee, or where moneys have been earned by or received on behalf of such incompetent person, the committee must account for any moneys so earned or derived from such services, the same as for other property or assets of the incompetent person.

L. 1894, ch. 51.

§ 2342. [Am'd, 1895.] Id.; may be compelled to file the same, or render an additional account, etc.

In the month of February of each year, the presiding judge of the court by which the committee of the property was appointed, or, if he was appointed by the Supreme Court, the county judge of the county where the order appointing him is entered, must examine, or cause to be examined under his direction, all accounts and inventories filed by committees of the person and property, since the first day of February of the preceding year. If it appears upon the examination, that a committee, appointed as prescribed in this title, has omitted to file his annual inventory or accounting, or the affidavit relating thereto, as prescribed in the last section ; or if the judge is of the opinion that the interest of the person, with respect to whom the committee was appointed, requires that he should render a more full or satisfactory inventory or account, the judge must make an order, requiring the committee to supply the deficiency, and also, in his discretion, personally to pay the expense of serving the order upon him. An order so made may be entered and enforced, and the failure to obey it may be punished, as if it were made by the court. Where the committee fails to comply with the order, within three months after it is made, or where the judge has reason to believe that sufficient cause exists for the removal of the committee, the judge may, in his discretion, appoint a fit person special guardian of the incompetent person with respect to whom the committee was appointed for the purpose of filing a petition in his behalf for the removal of the committee and prosecuting the necessary proceedings for that purpose. The committee may be compelled, in the discretion of the court, to pay personally the costs of the proceedings so instituted. The committee of the property of an incompetent person appointed as prescribed in this title, may at any time in the discretion of the court making such appointment, render to such court an intermediate judicial account of all his proceedings affecting the property of the incompetent person to the date of the filing thereof ; and said account shall be then judicially adjusted, determined, and filed ; and the same shall be in all respects a final judicial account of the proceedings of said committee affecting said property to that time. Notice of the application for such intermediate accounting shall be given in the manner in which and to the persons to whom notice of application for the appointment of a committee of the person or property of an alleged lunatic, idiot, or habitual drunkard is required to be given by title six of chapter seventeen of the Code of Civil Procedure. The court shall have power and it shall be its duty, if, in its discretion, the interests of the person with respect to whom the committee was appointed, require it, to appoint a suitable person as special guardian of the incompetent person for the protection of his rights and interests in said proceeding.

L. 1874, ch. 446, § 4. am'd ; see § 2844 ; L. 1895, ch. 740, superseding amendment in ch. 946 ; see ch. 946, § 4.

§ 2343. Property, when to be restored.

Where a person, with respect to whom a committee is appointed, as prescribed in

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this title, becomes competent to manage himself or his affairs, the court must make an order, discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property, remaining in the committee's hands. Thereupon the property must be restored accordingly.

Id. § 28, am'd.

§ 2244. Id. ; disposition in case of death.

Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases ; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed.

Id. § 29 and § 25, am'd by L. 1865, ch. 724 (6 Edm. 581).

It is said, in *Matter of Roberts*, 3 Johns. Ch. 43, that a committee of a lunatic is entitled to compensation for his services in receiving and paying out moneys, the same as a guardian or executor, and in *Matter of Livingston*, 9 Paige, 440, that besides actual expenditures and disbursements, the court cannot allow the committee for his personal services any other or greater compensation than that allowed to executors and administrators. But in the *Estate of Colah*, 6 Daly, 51, it was held that the committee was an officer of the court, and in the absence of legislation at that time the court had discretion as to compensation, and \$5,000 was allowed. This was, of course, previous to the enactment of the present section, which regulates the compensation in accordance with the earlier decisions. The power of the court to allow costs and expenses incurred by the committee continues up to the final report of the referee to settle his accounts ; the reasonable charges of applications made to the court by the committee for instructions may be allowed as a necessary disbursement. *Matter of Clapp*, 20 How. 385. An allowance for services cannot be made to one who has acted as an attorney for the lunatic and the committee without notice to the committee. *Matter of Clowes*, 3 Law Bull. 21. The committee of an habitual drunkard who was guilty of gross negligence will be charged with costs of proceedings for his removal and to procure a settlement of his accounts. *Matter of Carter*, 3 Paige, 146. The committee of a lunatic on a final accounting is entitled to full compensation for receiving and paying out the property without regard to sums disbursed as expenses. The matter of allowing counsel fees is in the discretion of the court. *In re Blossom's Estate*, 7 Supp. 360, 26 St. Rep. 763. The Supreme Court has power to revise or modify the decision of the Court of Common Pleas as to allowances for ex-

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penses, etc., made to a committee of a lunatic for the execution of a trust. *Butler v. Jarvis*, 51 Hun, 248, Van Brunt, J., dissenting.

In *Matter of Burr*, 17 Barb. 9, Mr. Justice Hand defines the duties of the committee as follows, citing many authorities: "The duties of the committee of the person are very delicate and important, being, says Mr. Shelford, to administer all the comfort and amusement the nature of the case will admit or the funds of the lunatic afford. He should be treated with great kindness, and all reasonable means of restoration should be employed, and, so far as necessary for this purpose, the expectations of the next of kin and all others disregarded; the great principal that pervades all orders in cases of lunacy is solely and exclusively his interest and comfort."

If any person is furnishing an habitual drunkard with the means of intoxication, the committee should apply to the court for an order restraining all persons from furnishing the drunkard with ardent spirits or means of obtaining it without the sanction of the committee, and a violation of the order, after notice, will be punished as a contempt. *Matter of Heller*, 3 Paige, 199; *Matter of Hoag*, 7 id. 312. Judgments by an innkeeper for ardent spirits sold under such circumstances were set aside. *L'Amoreaux v. Crosby*, 2 Paige, 402.

A bill may be filed for the enforcement of a debt of the lunatic against the committee alone. *Brasher v. Cortlandt*, 2 Johns. Ch. 400. The general practice is to unite the lunatic with the committee in a bill brought against him. *Ortley v. Messere*, 7 Johns. Ch. 139. It is a contempt to sue the lunatic after appointment of a committee. *Matter of Hopper*, 5 Paige, 489. As to joinder of the lunatic and committee, in an action as defendants, see *Teal v. Woodworth*, 3 Paige, 470; *New v. New*, 6 id. 237. The committee, under the direction of the court, has the entire control of the lunatic. Hoff. Ch. Pr. 262, cited, 2 Crary's Pr. 29. The whole estate, both real and personal, of the lunatic, may be expended by the committee for his support. *Matter of McFarlan*, 2 Johns. Ch. 440. If the lunatic resides in another State and has property there, that, properly, should be first applied to his support. *Matter of Taylor*, 9 Paige, 611.

The committee of a lunatic has no title to or interest in the real estate of a lunatic, being simply a representative of the court, he has no power to dispose of it in any manner without an order of

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the court ; thus he has no right either by common law or by statute to lease the property of a lunatic for a term exceeding five years without special direction of the court. *Paris v. Gere*, 110 N. Y. 336. By § 2329 the committee of the person or property of the lunatic is subject to the direction and control of the court by which he was appointed with respect to the execution of his duties. One of these duties is, upon the termination of his office, to hand over the property of the lunatic to the proper parties. The Supreme Court has power to pass upon the accounts of the committee of a lunatic and allow his commissions notwithstanding § 2344. *Matter of Grout*, 64 St. Rep. 340, 31 Supp. 602, 83 Hun 27. The power of a court over the property of a lunatic is limited by the provisions of title 7. Though § 2339 provides that the committee of the property or person of a lunatic is subject to the control and direction of the court, yet this direction and control cannot be construed to authorize the court to direct an extinguishment by the committee of the inchoate right of dower of a lunatic ; such power is not expressly given to the court by title 7, nor is it given by implication. *Matter of Dunn*, 64 Hun 20, 18 Supp. 723, 22 Civ. Pro. 118. Pending an action, the defendant was adjudged a lunatic and her committee thereupon substituted as a party ; *held*, a good defence to the action that no leave had been granted to sue the committee. *Matter of Delahunty*, 44 St. Rep. 837.

The court has jurisdiction on the application of an attorney who has rendered services to the committee of a lunatic to order the committee to pay for the full value of such services. *Matter of Norton*, 18 Misc. 406. Where a committee has been discharged and the property of a former incompetent been restored to him, the court has no further control over such property except to pass the accounts of the committee ; thus the court cannot compel a restoration of property from persons to whom the former incompetent has transferred after the committee's discharge. *Matter of Dowd*, 19 Misc. 688.

Where the estate of the lunatic is large, the committee may be allowed clerk hire out of the estate. *Matter of Livingston*, 9 Paige, 440, affirmed without opinion, 2 Denio, 575. The resignation of the committee will not be accepted merely because the duties have become unpleasant. *Matter of Lytle*, 3 Paige, 251. An order of reference will be made on such an application.

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Matter of Miller, 15 Abb. 277. An order removing the committee is discretionary and is not appealable to the General Term. *Matter of Guffer*, 5 Abb. (N. S.) 96. But under the decision in *Mar. in v. Windsor Hotel Co.*, 70 N. Y. 101, matters of substance, although discretionary, may be reviewed on appeal to the General Term.

The committee of a lunatic's estate who invested it in a mortgage on realty may release a part of the mortgaged premises without applying to the court. *Pickersgill v. Reed*, 5 Hun, 170. The committee of an habitual drunkard ought not to make him a monthly allowance for spending money. *Stephens v. Marshall*, 23 Hun, 641.

After inquisition found, and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of the demands existing against it, and this relief may be granted on petition of a complainant, but where the estate is insufficient to pay all the debts in full, the assets, personal and real, must be distributed among the claimants ratably. Where the committee occupied leased premises, and carried on the business of the lunatic, the rent accruing will be regarded as a reasonable expense incurred by the committee, to be paid in preference to other creditors. *In re Otis*, 101 N. Y. 580. After an adjudication of lunacy has been made and confirmed, and a committee appointed and qualified, the committee occupies the same place and fills the same position as the lunatic in regard to his personal estate and property. He has the same right to deal therewith as the lunatic enjoyed before inquisition found, and is his representative in respect to all matters connected with the estate. *Victs v. Union Nat. Bank of Troy*, 101 N. Y. 569. The proper course, where there is a committee, is to petition the court, which may either allow a suit or direct a reference. *Matter of Hopper*, 5 Paige, 189; *Williams v. Cameron*, 26 Barb. 172; *Soverhill v. Dickinson*, 5 How. 109; *Matter of Wing*, 5 Hun, 170; *Sandford v. Sandford*, 62 N. Y. 553; *Robertson v. Lain*, 19 Wend. 649; *Clarke v. Dunham*, 4 Denio, 262; *Matter of Heller*, 3 Paige, 199; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242, 400.

Where the motion for leave to sue is heard on conflicting affidavits it will be granted, where a case is shown, which, if proved, would entitle a party to relief in equity. *Matter of Wing*, 2 Hun, 671.

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The same rule, requiring leave to sue as to habitual drunkards, is held in *Brown v. Betts*, 13 Wend. 29; *L'Amoreaux v. Crosby*, 2 Paige, 422; *Niblo v. Hamson*, 9 Bosw. 668; *Hall v. Taylor*, 8 How. 428. Proceedings to foreclose a mortgage against an habitual drunkard cannot be taken without leave of the court. *Ex parte Parker*, 6 Alb. L. J. 324. Lunatic defendant can voluntarily appear, and the court will appoint guardian *ad litem* for him in partition. *Rogers v. McLean*, 34 N. Y. 536. The committee will, of course, be appointed special guardian where he has no adverse interest to the lunatic where both are sued. *New v. New*, 6 Paige, 237. A committee who has consented to have the rights of the parties litigated on a bill filed cannot afterward object that he had been proceeded against in that manner, without leave of the court by which he was appointed. *Outtrin v. Graves*, 1 Barb. Ch. 49. An attorney was authorized to appear for an idiot of full age on his retainer, in *Faulkner v. McClure*, 18 Johns. 134. As to when a judgment against a lunatic is not void. *Sternbergh v. Schoolcraft*, 2 Barb. 153; *Matter of Hopper*, 5 Paige, 489; *Person v. Warren*, 14 Barb. 488; *Loomis v. Spencer*, 2 Paige, 153; *Prentiss v. Cornell*, 31 Hun, 167, affirmed, 96 N. Y. 665. Judgment was set aside in *Demelt v. Leonard*, 19 How. 140. An habitual drunkard can have no lucid intervals; the inquisition is in the nature of a proceeding *in rem*, and persons subsequently dealing with him are deemed to have notice of his incapacity. *Wadsworth v. Sharpsteen*, 8 N. Y. 388. All acts done after inquisition found are absolutely void. *L'Amoreaux v. Crosby*, 2 Paige, 422. But the finding of an inquisition against an habitual drunkard is only *prima facie* evidence of the invalidity of an act done before the commission issued, but which is overreached by the finding. *Van Deusen v. Sweet*, 51 N. Y. 378; *Van Wyck v. Brasher*, 81 id. 260. In the latter case it is said that an habitual drunkard is not incompetent to execute a deed; he simply is incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication, or upon proof of general unsoundness of mind. *Peck v. Cary*, 27 N. Y. 9; *Gardner v. Gardner*, 22 Wend. 526. This holding relates to an act before inquisition found, and does not necessarily conflict with *Wadsworth v. Sharpsteen*, 8 N. Y. 388, *supra*. It is held in *Lewis v. Jones*, 50 Barb. 645, that an habitual drunkard, while subject to a committee, is only *prima facie* incompe-

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tent to make a will, and the like rule is held as to a deed. *Van Deusen v. Sweet*, 51 N. Y. 378; *Rider v. Miller*, 86 id. 507; *Hirsch v. Tramor*, 3 Abb. N. C. 274; *Searles v. Harvey*, 6 Hun, 658. So also as to a note. *Hicks v. Marshall*, 8 id. 327. And in case of marriage. *Banker v. Banker*, 63 N. Y. 409. It is said a person against whom an inquisition in lunacy has been issued, but who is not concededly incapable of managing his own affairs, cannot be deprived of the control of his property, or the right to take legal proceedings to obtain satisfaction of a valid demand before an adverse decision by a jury. *Estate of Halsey*, 16 Week. Dig. 437. A proceeding *de lunatico* has no effect on a contract made without notice, and on the faith that the person contracted with was of competent understanding. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541.

Where a lunatic continued to reside with his family after inquisition, and parties ignorant of the commission furnished him groceries, the bill was ordered paid by the committee. *Matter of Wing*, 2 Hun, 671. See *Ex parte Cunningham*, id. 114. The committee of a lunatic, by taking possession of property leased by a lunatic, and continuing it for the use of the estate, makes himself liable in the same manner as an executor or trustee. *Matter of Otis*, 34 Hun, 542. For further references as to contracts of lunatics, actions against lunatics, and management of estates of lunatics, see Brightly's Dig., vol. 2, page 2571, and vol. 3, page 5378, title "Lunacy."

Any proceedings which have for their design to divest a lunatic of his title to real property and to transfer it to another are in derogation of the common law, which requires every prerequisite to be fully and literally observed. Thus, where the committee of the lunatic transferred his real property by the execution and delivery of a deed, without permission of the court, he thereby transferred no title, and therefore any consideration he received did not legally come into his hands; *held*, therefore, that his sureties were not liable for his failure to pay it over. *Johnston v. Ayres*, 18 App. Div. 498.

Independent of statute, courts have no authority to sell the real estate of a lunatic, even for the payment of his debts, and even though his heirs at law and next of kin consent to such sale. *Walrath v. Abbott*, 75 Hun, 450, 59 St. Rep. 644. It seems that if the committee without the order of the court convey real prop-

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erty of the lunatic, no title will be acquired by the transferee which would be good against the lunatic or his heirs. Nor will it be presumed that the committee had procured the proper order to make such sale. *Walrath v. Abbott*, 92 Hun, 606 (2d appeal). A committee may sue in his own name to cancel the sale of a farm to a lunatic, and to procure satisfaction of a mortgage executed by him. *Fields v. Fowler*, 2 Hun, 400. Although it was held before the enactment of this section that the committee was not the trustee of an express trust, and not authorized to bring an action as to real estate. *Burnet v. Bookstaver*, 10 Hun, 481 ; *McKillip v. McKillip*, 8 Barb. 552. But a contrary rule is held in *Pearson v. Warren*, 14 id. 488. Committee cannot ratify a contract of a lunatic made by him after office found, so as to maintain an action upon it. *Fitzhugh v. Wilcox*, 12 Barb. 235. The committee of a lunatic may maintain an action to set aside a purchase of real property, pending a commission against the vendor as an habitual drunkard. It is contempt of court. *Griswold v. Miller*, 15 Barb. 520. The defendant sought to reverse a judgment on the ground that the plaintiff was insane at the time of the commencement of the action, and was incompetent to employ an attorney, and, therefore, the attorney was without authority to appear for him. The plaintiff had not been judicially declared to be a lunatic, but was confined in an asylum and pronounced by the physicians there to be incurably insane. *Held*, that the right to commence an action in the name of a person of unsound mind, before he is declared to be such, is implied by this section. That a lunatic has a legal standing to appear as a party until a committee has been appointed as provided by law. *Rumberg v. Johnson*, 5 State Rep. 860.

The word "may" in § 2340, giving the committee authority to sue, should not be construed as "must" or "shall." The section is permissive only and not mandatory. An action of ejectment may, therefore, be properly brought in the name of the plaintiff, although he is a lunatic and although a committee has been appointed of his person and estate. In equity actions, however, the lunatic should be named as party suing by his committee, unless the action is for a debt transferred to the committee, as to which matters the committee may be sued in their own name. *Skinner v. Tibbits*, 13 Civ. Pro. 372. The committee of a lunatic

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is a "person aggrieved" on *certiorari* to review an assessment, and therefore may review such assessment. Under the authority of § 2340 he may have such a writ of *certiorari* to review such assessment. *People ex rel. Canaday v. Williams*, 90 Hun, 502. The law before the passage of the Code of Civil Procedure authorized committees to sue only in cases relating to personal estate; but by virtue of § 2340 power was given to the committee to institute actions relating to real estate. Mr. Throop, in his notes to this section, says that the provision "was amended so as to embrace all cases where a remedy is pursued." Therefore, the committee of the lunatic may maintain an action for the partition of real estate in his own name by adding his official title. He need not make the lunatic a party. *Koepeke v. Bradley*, 3 App. Div. 392. If the committee neglects to file an inventory or to render his accounts regularly, under oath, in the settlement of his accounts, every intendment will be taken most strongly against him. *Matter of Carter*, 3 Paige, 146; *Matter of Seaman*, 2 id. 409. When the committee of a drunkard fail to file the inventories required by law, and do not, at the commencement of the proceedings, disclose all the property they have received, they may properly be charged with one-half of the expenses of the accounting. The committee should not be credited with amounts allowed by them to the inebriate as spending money, subject to abuse by him, nor for an expenditure which it does not clearly appear that the inebriate, if in possession of his faculties, would probably have made himself. The committee should forfeit their commissions on moneys charged to them because its expenditure was improper and subversive of the purposes of their appointment, but such mismanagement furnishes no justification for a refusal to correct a clerical error in their accounts, whereby they have charged, instead of crediting themselves, with a sum of money. *Matter of Stevens*, 13 Week. Dig. 567, 23 Hun, 641. Leave will not be granted to discontinue proceedings to compel a committee of a deceased lunatic to account upon the application of the administrator in order to enable the latter to begin an action for the same purpose in another court. *Matter of Butler*, 8 Civ. Pro. 56. It seems that the annual accounts of the committee of a lunatic may be examined by means of a reference under authority of the Code of Civil Procedure, § 2844. *Matter of De Russy*, 37 St. Rep. 648,

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14 N. Y. Supp. 178 ; see following section, § 2342, as to the examination of the accounts of committee.

Inventory and Account of Committee.

ULSTER COUNTY COURT.

In the Matter of the Accounting of John W.
Searing, Committee of David A. Abeel, an
Habitual Drunkard.

INVENTORY.

A just and true inventory of the property of David A. Abeel, an habitual drunkard, on the 1st day of April, 1886, made pursuant to law, by John W. Searing, committee of said habitual drunkard.

The assets of said habitual drunkard in my charge and under my control consist of :

A farm lying in the town of Saugerties, consisting of one hundred and fifty acres, valued at	\$10,000
Stock thereon, valued at (give details of items).....	1,600
Twenty shares of bank stock in First National Bank of Saugerties, worth at par value.....	2,000
Balance of legacy left to David A. Abeel.....	2,500
Farm produce (itemized)	780
Bond and mortgage on real estate in town of Ghent, Columbia County.....	1,700
A dwelling-house in Saugerties.....	1,000
Total assets	\$19,580

I have made no investments during the year. I have received the following sums :

From sales of farm produce.....	\$ 750
From interest on bond and mortgage.....	102
From rent on house.....	60
From interest on loan.....	150
From rent of farm.....	1,000
From all other sources.....	300
	\$2,352

I have paid out for support and maintenance of said David A. Abeel and his family, and taxes and insurance.

1,500

In my hands \$852
April 4, 1886.

ULSTER COUNTY, ss. :

John W. Searing, the committee of the person and property of the above-named David A. Abeel, an habitual drunkard, being duly

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sworn, doth depose and say, that the foregoing inventory and account contain, to the best of deponent's knowledge and belief, a full and true statement of all his receipts and disbursements on account of said David A. Abeel, and all money and other personal property of the said David A. Abeel which have come into deponent's hands, or have been received by any other person by his order or authority, or for his use since his appointment, and of the value of all such property, together with a full and true account of the manner in which he has disposed of the same, and of all the property remaining in his hands at the time of the filing of said inventory and account; and a full and true description of the amount and nature of each investment made by him since his appointment, and that he does not know of any error or omission in the said inventory or account to the prejudice of the said David A. Abeel.

(Add *jurat.*)

(Signature.)

Section 2342 does not give to the court originally appointing the committee of a lunatic the exclusive jurisdiction over the estate of the lunatic after his decease. Thus, where a committee was appointed by the Court of Common Pleas, the Supreme Court has jurisdiction on an accounting under this section. *Butler v. Jarvis*, 51 Hun, 252, 4 Supp. 138, Van Brunt, J., dissenting.

The court will not restore the estate and discharge the committee of an habitual drunkard, except upon proof of a permanent restoration; there should be a year's voluntary and total reformation. *Matter of Hoag*, 7 Paige, 312. A petition by a lunatic to supersede a commission may be referred, or he may be examined by the court. *Matter of Hanks*, 3 Johns. Ch. 567. Where, after a committee has been appointed, the mind of the lunatic has been restored in part, the court may discharge the proceedings against him partially, so far as to enable him to make a will under judicial supervision, with leave to revoke it wholly without such sanction, retaining, however, control of his property so far as is necessary to protect it. *Matter of Burr*, 2 Barb. Ch. 208. Where committees both of the person and estate have been appointed, the former will not be discharged on the petition of the lunatic, alleging that he is so far restored to reason as to be able to govern himself, if it does not appear that he is yet competent to manage his estate, if no application is made to discharge the committee of his estate.

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Precedent for Order Discharging Committee

At a term of the county court held at the court-house in the city of Kingston, Ulster County, N. Y., June 23, 1886 :

Present :—Hon. William S. Kenyon, *County Judge of Ulster County.*

In the Matter of David A. Abeel, an Habitual
Drunkard.

On reading and filing the petition of David A. Abeel, above named, dated June 20, 1886, setting forth that he has been habitually temperate in the use of ardent spirits for twelve months past, and praying for the discharge of his committee, John W. Searing, heretofore appointed in the above matter, and for the restoration of his property, and on reading and filing the affidavits of John Craw and Hiram Connors, dated respectively May 15, 1886, and May 23, 1886, in support of said petition, and upon examining the said David A. Abeel, in open court, as to his habits, etc. :

It is hereby ordered on motion of Charles Davis, counsel for said David A. Abeel, that the said committee, John W. Searing, heretofore appointed herein of the person and estate of said David A. Abeel, be and he is hereby discharged, and that he restore to said David A. Abeel the property remaining in his hands of the said David A. Abeel, after deducting the legal charges and expenses of the said committee.

WILLIAM S. KENYON,

County Judge of Ulster County.

It seems that under § 2343 the Supreme Court has authority to make an order discharging the committee, although it was appointed by the Court of Common Pleas. *Butler v. Jarvis*, 51 Hun, 252, 4 Supp. 138. It seems that the provisions of § 2343, for the discharge of the committee when the person subject to the commission becomes "competent to manage his affairs," does not mean competency to manage a large estate, if the person happens to possess one. The test of a man's right to be restored to the control and possession of his property is not competency to manage a large estate, but his restoration to mental health and his fitness for the common and ordinary affairs of life. *Matter of Brugh*, 61 Hun, 197, 16 Supp. 551, 40 St. Rep. 573. See this case for tests for recovery of sanity as approved by the court.

After the committee has been discharged on the lunatic's recovery the court has no further jurisdiction over the property of the former lunatic, except to pass upon the accounts of the committee. Thus the court cannot compel the restoration of property by one to whom it has been transferred by the former

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lunatic after the committee has been discharged. *Matter of Dowd*, 19 Misc. 688. Section 2343 applies only to the recovery of the lunatic and not to his death. Therefore the court has no power after the death of lunatic to supersede the commission of lunacy on the ground that the lunatic has been restored to reason. *Matter of Owens*, 44 St. Rep. 307. In proceedings for the supersedeas of a commission of the lunatic the manner of determining the question as to the sanity of the lunatic is in the discretion of the court. The supposed lunatic has no right to have the question of his lunacy submitted to a jury, and the court may determine it either upon affidavits, or personal examination of witnesses, or by sending it to a referee to take evidence and report, or by trial before a jury. *Matter of Blewitt*, 138 N. Y. 149, 51 St. Rep. 844.

Upon the death of a lunatic, the powers and duties of his committee cease; any legal claims against the estate can thereafter only be enforced in the manner furnished by law. *Matter of Beckwith*, 87 N. Y. 503. By § 2344 it seems that the committee of the person and estate of the lunatic who purchased real estate with the name of the lunatic has no right to take title in his own name as committee, but such title should be taken in the name of the lunatic. *People ex rel. Canaday v. Williams*, 90 Hun, 503. Where a lunatic has died and an administratrix is appointed pending suit instituted by the lunatic's committee to obtain possession of money, a trustee will be appointed to carry on the litigation. *Killick v. Monroe County Sav. Bank*, 1 Supp. 501, 17 St. Rep. 283. Where no executor or administrator is appointed over a lunatic's estate upon his death the committee may apply to the court for his discharge, on giving notice to the heirs and next of kin. Upon such discharge the committee should be allowed payments made by him before his appointment for claims against the lunatic and for sums expended in the support of the lunatic's children. *Matter of Forkell*, 8 App. Div. 399. But such allowance should be passed upon by the court appointing the committee, and should not be determined in a proceeding to compel payment to the committee of an award for the lands of the lunatic taken in condemnation proceedings. *Matter of Board of Street Opening*, 89 Hun, 527, 69 St. Rep. 796.

By virtue of § 2344 the property of the lunatic upon his death is administered as if no committee had been appointed, and the

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estate of the deceased incompetent is turned over to the executor or administrator and the debts of the estate are paid by such executor or administrator. *Matter of Dowd*, 19 Misc. 690. Although the lunatic has died, a person whose deed has been invalidated by an inquisition will be permitted to traverse the inquisition. *Matter of Owens*, 44 St. Rep. 307. Where a lunatic died before the confirmation of the inquisition, the court has jurisdiction to order the costs and expenses of the proceeding to be paid out of the estate. *Matter of Lofthouse*, 3 App. Div. 140.

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